

104

**PATENT AND TRADEMARK OFFICE GOVERNMENT CORPORATION**

Y 4. J 89/1:104/63

Patent and Trademark Office Governn...

**RINGS**

ORE THE

**SUBCOMMITTEE ON  
COURTS AND INTELLECTUAL PROPERTY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES**

**ONE HUNDRED FOURTH CONGRESS**

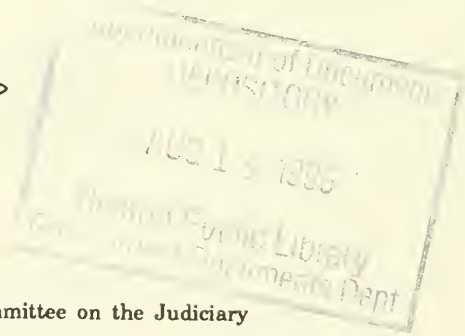
**FIRST AND SECOND SESSIONS**

**ON**

**H.R. 1659, H.R. 1756, and H.R. 2533**

**SEPTEMBER 14, 1995, AND MARCH 8, 1996**

**Serial No. 63**



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1996

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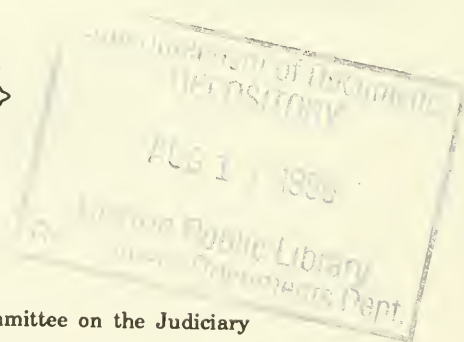
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# PATENT AND TRADEMARK OFFICE GOVERNMENT CORPORATION

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THURSDAY, SEPTEMBER 14, 1995

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS AND  
INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, Bob Goodlatte, Sonny Bono, Martin R. Hoke, Patricia Schroeder, Howard L. Berman, and Xavier Becerra.

Also present: Thomas E. Mooney, chief counsel; Mitch Glazier, assistant counsel; Veronica Eligan, secretary; and Betty Wheeler, minority counsel.

## OPENING STATEMENT OF CHAIRMAN MOORHEAD

Mr. MOORHEAD. The Subcommittee on Courts and Intellectual Property will come to order. Today the subcommittee is holding the first of 2 days of hearings on H.R. 1659, the Patent and Trademark Office Corporation Act of 1995, H.R. 1756, the Commerce Department Dismantling Act, and on the Patent and Trademark Corporation Act of 1995, which we plan to introduce by request on behalf of the administration.

The thrust of these bills is to enable the U.S. Patent and Trademark Office to improve the services it provides to the public. I am pleased to have as an original cosponsor of H.R. 1659 the ranking member of this subcommittee, Mrs. Schroeder. Our legislation will convert the Patent and Trademark Office to a freestanding Government Corporation, giving it the operating and financial flexibility it lacks today as a bureau in the Department of Commerce. This added flexibility will allow the PTO to operate more like a business and provide better service to its customers at a lower cost.

The PTO is a perfect candidate for conversion to a Government Corporation because it does not use any general tax revenues to support its operations. Its entire operational costs come from the sale of products and services to inventors, companies, and other customers. The legislation before us would allow the Commissioner of Patents and Trademarks to head the Government Corporation in a businesslike manner while providing necessary congressional and independent oversight. H.R. 1659 establishes a Management Advi-

sory Committee that will afford users a voice in how the PTO is operated.

The fiscal year budget resolution assumes the elimination of the Department of Commerce, which could have a substantial impact on the future of the Patent and Trademark Office. H.R. 1756, the Department of Commerce Dismantling Act, as originally introduced, transfers the PTO to the Department of Justice. I have received a letter from Representative Chrysler, the author of the bill, asserting that he is in support of replacing that provision of the bill with language providing that the PTO become an independent Government Corporation as it is reported out by the subcommittee.

It is important that this subcommittee act to protect the operations of the PTO and to provide the flexibility necessary to better serve its users and the public. To that end, H.R. 1659 provides specific authority for the PTO to purchase, lease, construct and manage property, the power to award contracts for facilities, services and printing, the power to use its revenues without apportionment by the Office of Management and Budget, the power to invest and earn interest on its money, and the power to issue bonds to finance its activities. These provisions will allow the PTO to pursue expensive automation activities without placing those costs exclusively on the backs of our country's innovators.

Our bill would further eliminate the practice of withholding several million dollars from the PTO each year that users have paid into the patent surcharge fund. It gives the PTO access to all its revenues.

Officers and employees of today's PTO would continue to be employees of the PTO Corporation and the Federal Government.

If this legislation is to achieve its objectives, it must be crafted very carefully, to ensure the necessary checks and balances. A great public interest is involved—this Office is the only place the public can go to obtain a patent or register a trademark. Because the PTO is not subject to the performance pressure that arises out of corporate competition, the bills considered today do not "privatize" the PTO by giving it all the freedom to become a private company. It would continue to be a part of the Federal Government under the direction and oversight of the President and the Congress. However, the added flexibility on the bill should improve the PTO's efficiency and responsiveness to the public. I look forward to working with all interested parties as we move this legislation through the Congress.

[The bills, H.R. 1659 and H.R. 1756, follow:]



104TH CONGRESS  
1ST SESSION

# H. R. 1659

To amend title 35, United States Code, to establish the Patent and Trademark Office as a Government corporation, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 17, 1995

Mr. MOORHEAD (for himself and Mrs. SCHROEDER) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend title 35, United States Code, to establish the Patent and Trademark Office as a Government corporation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Patent and Trademark  
5 Office Corporation Act of 1995".

1                   **TITLE I—PATENT AND**  
2                   **TRADEMARK OFFICE**

3   **SEC. 101. ESTABLISHMENT OF PATENT AND TRADEMARK**  
4                   **OFFICE AS A CORPORATION.**

5           Section 1 of title 35, United States Code, is amended  
6 to read as follows:

7   **“§ 1. Establishment**

8           “(a) **ESTABLISHMENT.**—The Patent and Trademark  
9 Office is established as a wholly owned Government cor-  
10 poration subject to chapter 91 of title 31, except as other-  
11 wise provided in this title.

12           “(b) **OFFICES.**—The Patent and Trademark Office  
13 shall maintain an office in the District of Columbia, or  
14 the metropolitan area thereof, for the service of process  
15 and papers and shall be deemed, for purposes of venue  
16 in civil actions, to be a resident of the District of Colum-  
17 bia. The Patent and Trademark Office may establish of-  
18 fices in such other places as it considers necessary or ap-  
19 propriate in the conduct of its business.

20           “(c) **REFERENCE.**—For purposes of this title, the  
21 Patent and Trademark Office shall also be referred to as  
22 the ‘Office.’”.

23   **SEC. 102. POWERS AND DUTIES.**

24           Section 2 of title 35, United States Code, is amended  
25 to read as follows:

1 **“§ 2. Powers and Duties**

2 “(a) IN GENERAL.—The Patent and Trademark Of-  
3 fice shall be responsible for—

4 “(1) the granting and issuing of patents and  
5 the registration of trademarks;

6 “(2) conducting studies, programs, or ex-  
7 changes of items or services regarding domestic and  
8 international patent and trademark law or the ad-  
9 ministration of the Office, including programs to  
10 recognize, identify, assess, and forecast the tech-  
11 nology of patented inventions and their utility to in-  
12 dustry;

13 “(3) authorizing or conducting studies and pro-  
14 grams cooperatively with foreign patent and trade-  
15 mark offices and international organizations, in con-  
16 nection with the granting and issuing of patents and  
17 the registration of trademarks; and

18 “(4) disseminating to the public information  
19 with respect to patents and trademarks.

20 “(b) SPECIFIC POWERS.—The Office—

21 “(1) shall have perpetual succession;

22 “(2) shall adopt and use a corporate seal, which  
23 shall be judicially noticed and with which letters pat-  
24 ent, certificates of trademark registrations, and pa-  
25 pers issued by the Office shall be authenticated;

1           “(3) may sue and be sued in its corporate name  
2           and be represented by its own attorneys in all judi-  
3           cial and administrative proceedings;

4           “(4) may indemnify the Commissioner of Pat-  
5           ents and Trademarks, and other officers, attorneys,  
6           agents, and employees (including members of the  
7           Management Advisory Board established in section  
8           5), of the Office for liabilities and expenses incurred  
9           within the scope of their employment;

10          “(5) may adopt, amend, and repeal bylaws,  
11          rules, and regulations, governing the manner in  
12          which its business will be conducted and the powers  
13          granted to it by law will be exercised, without regard  
14          to chapter 35 of title 44;

15          “(6) may acquire, construct, purchase, lease,  
16          hold, manage, operate, improve, alter, and renovate  
17          any real, personal, or mixed property, or any interest  
18          therein, as it considers necessary to carry out its  
19          functions, without regard to the provisions of the  
20          Federal Property and Administrative Services Act of  
21          1949;

22          “(7)(A) may make such purchases, contracts  
23          for the construction, maintenance, or management  
24          and operation of facilities, and contracts for supplies  
25          or services, after advertising, in such manner and at

1 such times sufficiently in advance of opening bids, as  
2 the Office determines is adequate to ensure notice  
3 and an opportunity for competition, except that ad-  
4 vertising shall not be required when the Office deter-  
5 mines that the making of any such purchase or con-  
6 tract without advertising is necessary, or that adver-  
7 tising is not reasonably practicable;

8 “(B) may enter into and perform such pur-  
9 chases and contracts for printing services, including  
10 the process of composition, platemaking, presswork,  
11 silk screen processes, binding, microform, and the  
12 products of such processes, as it considers necessary  
13 to carry out the functions of the Office, without re-  
14 gard to sections 501 through 517 and 1101 through  
15 1123 of title 44; and

16 “(C) may enter into and perform such other  
17 contracts, leases, cooperative agreements, or other  
18 transactions with international, foreign, and domes-  
19 tic public agencies and private organizations, and  
20 persons as is necessary in the conduct of its business  
21 and on such terms as it considers appropriate;

22 “(8) may use, with their consent, services,  
23 equipment, personnel, and facilities of other depart-  
24 ments, agencies, and instrumentalities of the Fed-  
25 eral Government, on a reimbursable basis, and to co-

1 operate with such other departments, agencies, and  
2 instrumentalities in the establishment and use of  
3 services, equipment, and facilities of the Office;

4 “(9) may obtain from the Administrator of  
5 General Services such services as the Administrator  
6 is authorized to provide to other agencies of the  
7 United States, on the same basis as those services  
8 are provided to other agencies of the United States;

9 “(10) may use, with the consent of the agency,  
10 government, or international organization concerned,  
11 the services, records, facilities, or personnel of any  
12 State or local government agency or instrumentality  
13 or foreign government or international organization  
14 to perform functions on its behalf;

15 “(11) may determine the character of and the  
16 necessity for its obligations and expenditures and  
17 the manner in which they shall be incurred, allowed,  
18 and paid, subject to the provisions of this title and  
19 the Act of July 5, 1946 (commonly referred to as  
20 the ‘Trademark Act of 1946’);

21 “(12) may retain and use all of its revenues  
22 and receipts, including revenues from the sale, lease,  
23 or disposal of any real, personal, or mixed property,  
24 or any interest therein, of the Office, in carrying out  
25 the functions of the Office, including for research

1 and development and capital investment, without ap-  
2 portionment under the provisions of subchapter II of  
3 chapter 15 of title 31;

4 “(13) shall have the priority of the United  
5 States with respect to the payment of debts from  
6 bankrupt, insolvent, and decedents’ estates;

7 “(14) may accept monetary gifts or donations  
8 of services, or of real, personal, or mixed property,  
9 in order to carry out the functions of the Office;

10 “(15) may execute, in accordance with its by-  
11 laws, rules, and regulations, all instruments nec-  
12 essary and appropriate in the exercise of any of its  
13 powers;

14 “(16) may provide for liability insurance and  
15 insurance against any loss in connection with its  
16 property, other assets, or operations either by con-  
17 tract or by self-insurance; and

18 “(17) shall pay any settlement or judgment en-  
19 tered against it from the funds of the Office and not  
20 from amounts available under section 1304 of title  
21 31.”.

22 **SEC. 103. ORGANIZATION AND MANAGEMENT.**

23 Section 3 of title 35, United States Code, is amended  
24 to read as follows:

1 **“§ 3. Officers and employees**

2 “(a) COMMISSIONER.—

3 “(1) IN GENERAL.—The management of the  
4 Patent and Trademark Office shall be vested in  
5 Commissioner of Patents and Trademarks (hereafter  
6 in this title referred to as the ‘Commissioner’), who  
7 shall be a citizen of the United States and who shall  
8 be appointed by the President, by and with the ad-  
9 vice and consent of the Senate. The Commissioner  
10 shall be a person who, by reason of professional  
11 background and experience in patent and trademark  
12 law, is especially qualified to manage the Office.

13 “(2) DUTIES.—

14 “(A) IN GENERAL.—The Commissioner  
15 shall be responsible for the management and di-  
16 rection of the Office, including the issuance of  
17 patents and the registration of trademarks.

18 “(B) ADVISING THE PRESIDENT.—The  
19 Commissioner shall advise the President of all  
20 activities of the Patent and Trademark Office  
21 undertaken in response to obligations of the  
22 United States under treaties and executive  
23 agreements, or which relate to cooperative pro-  
24 grams with those authorities of foreign govern-  
25 ments that are responsible for granting patents  
26 or registering trademarks. The Commissioner



1 shall also recommend to the President changes  
2 in law or policy which may improve the ability  
3 of U.S. citizens to secure and enforce patent  
4 rights or trademark rights in the United States  
5 or in foreign countries.

6 “(C) CONSULTING WITH THE MANAGE-  
7 MENT ADVISORY BOARD.—The Commissioner  
8 shall consult with the Management Advisory  
9 Board established in section 5 on a regular  
10 basis on matters relating to the operation of the  
11 Patent and Trademark Office, and shall consult  
12 with the Board before submitting budgetary  
13 proposals to the Office of Management and  
14 Budget or changing or proposing to change pat-  
15 ent or trademark user fees or patent or trade-  
16 mark regulations.

17 “(3) TERM.—The Commissioner shall serve a  
18 term of six years, and may continue to serve until  
19 a successor is appointed and assumes office. The  
20 Commissioner may be reappointed to subsequent  
21 terms.

22 “(4) OATH.—The Commissioner shall, before  
23 taking office, take an oath to discharge faithfully the  
24 duties of the Office.

1           “(5) COMPENSATION.—The Commissioner shall  
2           receive compensation at the rate of pay in effect for  
3           Level II of the Executive Schedule under section  
4           5313 of title 5.

5           “(6) REMOVAL.—The Commissioner may be re-  
6           moved from office by the President only for cause.

7           “(7) DESIGNEE OF COMMISSIONER.—The Com-  
8           missioner shall designate an officer of the Office who  
9           shall be vested with the authority to act in the ca-  
10          pacity of the Commissioner in the event of the ab-  
11          sence or incapacity of the Commissioner.

12          “(b) OFFICERS AND EMPLOYEES OF THE OFFICE.—

13           “(1) DEPUTY COMMISSIONERS.—The Commis-  
14          sioner shall appoint a Deputy Commissioner for Pat-  
15          ents and a Deputy Commissioner for Trademarks  
16          for terms that shall expire on the date on which the  
17          Commissioner’s term expires. The Deputy Commis-  
18          sioner for Patents shall be a person with dem-  
19          onstrated experience in patent law and the Deputy  
20          Commissioner for Trademarks shall be a person with  
21          demonstrated experience in trademark law. The  
22          Deputy Commissioner for Patents and the Deputy  
23          Commissioner for Trademarks shall be the principal  
24          policy advisors to the Commissioner on all aspects of  
25          the activities of the Office that affect the adminis-

1       tration of patent and trademark operations, respec-  
2       tively.

3               “(2) OTHER OFFICERS AND EMPLOYEES.—The  
4       Commissioner shall—

5               “(A) appoint an Inspector General and  
6       such other officers, employees (including attor-  
7       neys), and agents of the Office as the Commis-  
8       sioner considers necessary to carry out its func-  
9       tions;

10              “(B) fix the compensation of such officers  
11       and employees in accordance with the policy set  
12       forth in section 5301 of title 5, including com-  
13       pensation based on performance; and

14              “(C) define the authority and duties of  
15       such officers and employees and delegate to  
16       them such of the powers vested in the Office as  
17       the Commissioner may determine.

18       The Office shall not be subject to any administratively or  
19       statutorily imposed limitation on positions or personnel,  
20       and no positions or personnel of the Office shall be taken  
21       into account for purposes of applying any such limitation,  
22       except to the extent otherwise specifically provided by stat-  
23       ute with respect to the Office.

24              “(c) LIMITS ON COMPENSATION.—Except as other-  
25       wise provided in this title or any other provision of law,

1 the basic pay of an officer or employee of the Office for  
2 any calendar year may not exceed the annual rate of basic  
3 pay in effect for level III of the Executive Schedule under  
4 section 5314 of title 5. The Commissioner shall by regula-  
5 tion establish a limitation on the total compensation pay-  
6 able to officers or employees of the Office, consistent with  
7 the limitation under section 5307 of title 5.

8       “(d) APPLICABILITY OF TITLE 5 GENERALLY.—Ex-  
9 cept as otherwise provided in this section, officers and em-  
10 ployees of the Office shall be subject to the provisions of  
11 title 5 relating to Federal employees.

12       “(e) TITLE 5 EXCLUSIONS.—The following provi-  
13 sions of title 5 shall not apply to the Office or its officers  
14 and employees:

15               “(1) Chapter 31 (relating to authority for em-  
16 ployment).

17               “(2) Chapter 33 (relating to examination, selec-  
18 tion, and placement), except that the provisions re-  
19 lating to a preference eligible shall apply to the Of-  
20 fice and its employees.

21               “(3) Chapter 35 (relating to retention pref-  
22 erence, restoration, and reemployment).

23               “(4) Chapter 43 (relating to performance ap-  
24 praisal).

25               “(5) Chapter 45 (relating to incentive awards).

1           “(6) Chapter 51 (relating to classification).

2           “(7) Subchapter III of chapter 53 (relating to  
3       General Schedule pay rates).

4           “(f) PROVISIONS OF TITLE 5 RELATING TO CERTAIN  
5       BENEFITS.—Officers and employees of the Office shall re-  
6       main subject to chapters 83 (relating to the Civil Service  
7       Retirement System), 84 (relating to the Federal Employ-  
8       ees’ Retirement System), 87 (relating to life insurance),  
9       and 89 (relating to health insurance) of title 5, except that  
10       the Office may, with respect to officers and employees of  
11       the Office, by regulation—

12           “(1) provide for benefits to supplement the ben-  
13       efits otherwise provided under such chapter 83 or  
14       84, as the case may be; or

15           “(2) change the benefits provided under such  
16       chapter 87 or 89, so long as the changes do not re-  
17       sult in benefits under either chapter becoming, on  
18       the whole, less favorable than the benefits which  
19       would then otherwise be available under such chap-  
20       ter had such changes not been made.

21           “(g) LABOR-MANAGEMENT RELATIONS.—Chapter 71  
22       of title 5 (relating to labor-management relations) shall  
23       apply with respect to the Office and its employees, except  
24       that—

1           “(1) the Office shall not bargain over the estab-  
2           lishment, implementation, amendment, or repeal  
3           of—

4                   “(A) any system of classification of em-  
5                   ployees;

6                   “(B) any compensation system, including  
7                   wages and compensation based on performance,  
8                   and contributions of the Office to the retire-  
9                   ment and benefits programs; or

10                   “(C) any system to determine qualifica-  
11                   tions and procedures for employment; and

12                   “(2) in any other matter, the Office may nego-  
13                   tiate only with respect to—

14                           “(A) procedures which management offi-  
15                           cials of the Office observe in exercising any au-  
16                           thority under section 7106 of title 5; and

17                           “(B) appropriate arrangements for employ-  
18                           ees adversely affected by the exercise of any au-  
19                           thority under section 7106 of title 5.

20           “(h) CARRYOVER OF PERSONNEL.—

21                   “(1) TO THE OFFICE.—Effective as of the ef-  
22                   fective date of the Patent and Trademark Office  
23                   Corporation Act of 1995, all officers and employees  
24                   of the Patent and Trademark Office on the day be-

1 fore such effective date shall become officers and  
2 employees of the Office, without a break in service.

3 “(2) 1-YEAR PROTECTIONS.—No individual who  
4 so becomes an officer or employee of the Office shall,  
5 for a period of 1 year after the effective date de-  
6 scribed in paragraph (1), be subject to separation or  
7 to any reduction in compensation as a consequence  
8 of the establishment of the Office as a Government  
9 corporation.

10 “(3) ACCUMULATED LEAVE.—The amount of  
11 sick and annual leave and compensatory time accu-  
12 mulated under title 5 before the effective date de-  
13 scribed in paragraph (1), by officers or employees of  
14 the Patent and Trademark Office who so become of-  
15 ficers or employees of the Office, are obligations of  
16 the Office.

17 “(4) CONTINUATION IN OFFICE OF CERTAIN  
18 OFFICERS.—(A) The individual serving as the Com-  
19 missioner of Patents and Trademarks on the day be-  
20 fore the effective date of the Patent and Trademark  
21 Office Corporation Act of 1995 may serve as the  
22 Commissioner for a period of 1 year beginning on  
23 such effective date or, if earlier, until a Commis-  
24 sioner has been appointed under subsection (a).

1           “(B) The individual serving as the Assistant  
2           Commissioner for Patents on the day before the ef-  
3           fective date of the Patent and Trademark Office  
4           Corporation Act of 1995 may serve as the Deputy  
5           Commissioner for Patents for a period of 1 year be-  
6           ginning on such effective date or, if earlier, until a  
7           Deputy Commissioner for Patents has been ap-  
8           pointed under subsection (b).

9           “(C) The individual serving as the Assistant  
10          Commissioner for Trademarks on the day before the  
11          effective date of the Patent and Trademark Office  
12          Corporation Act of 1995 may serve as the Deputy  
13          Commissioner for Trademarks for a period of 1 year  
14          beginning on such effective date or, if earlier, until  
15          a Deputy Commissioner for Trademarks has been  
16          appointed under subsection (b).

17          “(i) COMPETITIVE STATUS.—For purposes of ap-  
18          pointment to a position in the competitive service for  
19          which an officer or employee of the Office is qualified,  
20          such officer or employee shall—

21                 “(1) not forfeit any competitive status, acquired  
22                 by such officer or employee before the effective date  
23                 of the Patent and Trademark Office Corporation Act  
24                 of 1995, by reason of becoming an officer or em-  
25                 ployee of the Office pursuant to subsection (h)(1); or



1           “(2) if not covered by paragraph (1), acquire  
2 competitive status after completing at least 1 year of  
3 continuous service under a nontemporary appoint-  
4 ment to a position within the Office (taking into ac-  
5 count such service, performed before the effective  
6 date described in paragraph (1), as may be appro-  
7 priate).

8           “(j) SAVINGS PROVISIONS.—All orders, determina-  
9 tions, rules, and regulations regarding compensation and  
10 benefits and other terms and conditions of employment,  
11 in effect for the Office and its officers and employees im-  
12 mediately before the effective date of the Patent and  
13 Trademark Office Corporation Act of 1995, shall continue  
14 in effect with respect to the Office and its officers and  
15 employees until modified, superseded, or set aside by the  
16 Office or a court of appropriate jurisdiction or by oper-  
17 ation of law.”.

18 **SEC. 104. MANAGEMENT ADVISORY BOARD.**

19           Chapter 1 of part I of title 35, United States Code,  
20 is amended by inserting after section 4 the following:

21 **“§ 5. Patent and Trademark Office Management Advi-  
22 sory Board**

23           “(a) COMPENSATION.—

24           “(1) APPOINTMENT.—The Patent and Trade-  
25 mark Office shall have a Management Advisory

1 Board (hereafter in this title referred to as the  
2 'Board') of 18 members, 6 of whom shall be ap-  
3 pointed by the President, 6 of whom shall be ap-  
4 pointed by the Speaker of the House of Representa-  
5 tives, and 6 of whom shall be appointed by the  
6 President pro tempore of the Senate. Not more than  
7 4 of the 6 members appointed by each appointing  
8 authority shall be members of the same political  
9 party.

10       “(2) TERMS.—Members of the Board shall be  
11 appointed for a term of 6 years each, except that of  
12 the members first appointed by each appointing au-  
13 thority, 1 shall be for a term of 1 year, 1 shall be  
14 for a term of 2 years, 1 shall be for a term of 3  
15 years, 1 shall be for a term of 4 years, and 1 shall  
16 be for a term of 5 years. No member may serve  
17 more than 1 term.

18       “(3) CHAIR.—The President shall designate the  
19 chair of the Board, whose term as chair shall be for  
20 3 years.

21       “(4) TIMING OF APPOINTMENTS.—Initial ap-  
22 pointments to the Board shall be made within 3  
23 months after the effective date of the Patent and  
24 Trademark Office Corporation Act of 1995, and va-

1       cancies shall be filled within 3 months after they  
2       occur.

3           “(5) VACANCIES.—Vacancies shall be filled in  
4       the manner in which the original appointment was  
5       made under this subsection. Members appointed to  
6       fill a vacancy occurring before the expiration of the  
7       term for which the member’s predecessor was ap-  
8       pointed shall be appointed only for the remainder of  
9       that term. A member may serve after the expiration  
10      of that member’s term until a successor is ap-  
11      pointed.

12          “(b) BASIS FOR APPOINTMENTS.—Members of the  
13      Board shall be citizens of the United States who shall be  
14      chosen so as to represent the interests of diverse users  
15      of the Patent and Trademark Office, and shall include in-  
16      dividuals with substantial background and achievement in  
17      corporate finance and management.

18          “(c) APPLICABILITY OF CERTAIN ETHICS LAWS.—  
19      Members of the Board shall be special Government em-  
20      ployees within the meaning of section 202 of title 18.

21          “(d) MEETINGS.—The Board shall meet at the call  
22      of the chair to consider an agenda set by the chair.

23          “(e) DUTIES.—The Board shall—

24           “(1) review the policies, goals, performance,  
25      budget, and user fees of the Patent and Trademark

1 Office, and advise the Commissioner on these mat-  
2 ters; and

3 “(2) within 60 days after the end of each fiscal  
4 year, prepare an annual report on the matters re-  
5 ferred to in paragraph (1), transmit the report to  
6 the President and the Committees on the Judiciary  
7 of the Senate and the House of Representatives, and  
8 publish the report in the Patent and Trademark Of-  
9 fice Official Gazette.

10 “(f) STAFF.—The Board shall employ a staff and  
11 procure support services for the staff adequate to enable  
12 the Board to carry out its functions, using funds available  
13 to the Commissioner under section 42 of this title. Persons  
14 employed by the Board shall receive compensation as de-  
15 termined by the Board, serve in accordance with terms  
16 and conditions of employment established by the Board,  
17 and be subject solely to the direction of the Board, not-  
18 withstanding any other provision of law.

19 “(g) COMPENSATION.—Members of the Board may  
20 accept reimbursement for expenses incurred in attending  
21 meetings of the Board and compensation not to exceed  
22 \$1000 per day for each day in attendance at meetings of  
23 the Board.

24 “(h) ACCESS TO INFORMATION.—Members of the  
25 Board shall be provided access to records and information

1 in the Patent and Trademark Office, except for personnel  
2 or other privileged information and information concern-  
3 ing patent applications required to be kept in confidence  
4 by section 122 of this title.

5 “(i) **APPLICABILITY OF FEDERAL ADVISORY COM-**  
6 **MITTEE ACT.**—The provisions of the Federal Advisory  
7 Committee Act (5 U.S.C. App.) shall not apply to meet-  
8 ings of the Board, but all meetings of the Board shall be  
9 announced in the Federal Register at least 30 days in ad-  
10 vance and all meetings shall be open to the public unless  
11 closed by the Board for good cause.”.

12 **SEC. 105. INDEPENDENCE FROM DEPARTMENT OF COM-**  
13 **MERCE.**

14 Section 6 of title 35, United States Code, is amend-  
15 ed—

16 (1) by striking “, under the direction of the  
17 Secretary of Commerce,” each place it appears; and

18 (2) by striking “, subject to the approval of the  
19 Secretary of Commerce,”.

20 **SEC. 106. TRADEMARK TRIAL AND APPEAL BOARD.**

21 Section 17 of the Act of July 5, 1946 (commonly re-  
22 ferred to as the “Trademark Act of 1946”) (15 U.S.C.  
23 1067) is amended to read as follows:

24 “SEC. 17. (a) In every case of interference, opposition  
25 to registration, application to register as a lawful concur-

1 rent user, or application to cancel the registration of a  
2 mark, the Commissioner shall give notice to all parties and  
3 shall direct a Trademark Trial and Appeal Board to deter-  
4 mine and decide the respective rights of registration.

5 “(b) The Trademark Trial and Appeal Board shall  
6 include the Commissioner, the Deputy Commissioner for  
7 Patents, the Deputy Commissioner for Trademarks, and  
8 members competent in trademark law who are appointed  
9 by the Commissioner.”.

10 **SEC. 107. BOARD OF PATENT APPEALS AND INTER-**  
11 **FERENCES.**

12 Section 7 of title 35, United States Code, is amended  
13 to read as follows:

14 **“§ 7. Board of Patent Appeals and Interferences**

15 “(a) ESTABLISHMENT AND COMPOSITION.—There  
16 shall be in the Patent and Trademark Corporation a  
17 Board of Patent Appeals and Interferences. The Commis-  
18 sioner, the Deputy Commissioner for Patents, the Deputy  
19 Commissioner for Trademarks, the officer principally re-  
20 sponsible for the examination of patents, the officer prin-  
21 cipally responsible for the examination of trademarks, and  
22 the examiners-in-chief shall constitute the Board. The ex-  
23 aminers-in-chief shall be persons of competent legal knowl-  
24 edge and scientific ability.

1       “(b) DUTIES.—The Board of Patent Appeals and  
2 Interferences shall, on written appeal of an applicant, re-  
3 view adverse decisions of examiners upon applications for  
4 patents and shall determine priority and patentability of  
5 invention in interferences declared under section 135(a)  
6 of this title. Each appeal and interference shall be heard  
7 by at least 3 members of the Board, who shall be des-  
8 ignated by the Commissioner. Only the Board of Patent  
9 Appeals and Interferences may grant rehearings.”.

10 **SEC. 108. SUITS BY AND AGAINST THE CORPORATION.**

11       Chapter 1 of part I of title 35, United States Code,  
12 is amended—

13               (1) by redesignating sections 8 through 14 as  
14 sections 9 through 15; and

15               (2) by inserting after section 7 the following  
16 new section:

17 **“§ 8. Suits by and against the Corporation**

18       “(a) IN GENERAL.—

19               “(1) ACTIONS UNDER UNITED STATES LAW.—

20 Any civil action, suit, or proceeding to which the  
21 Patent and Trademark Office is a party is deemed  
22 to arise under the laws of the United States. Exclu-  
23 sive jurisdiction over all civil actions by or against  
24 the Office is in the Federal courts as provided by  
25 law.

1           “(2) CONTRACT CLAIMS.—Any action, suit, or  
2 proceeding against the Office founded upon contract  
3 shall be subject to the limitations and exclusive remedy  
4 provided in section 1346(a)(2) and sections  
5 1491 through 1509 of title 28, whether or not such  
6 contract claims are cognizable under the sections  
7 507, 1346, 1402, 1491, 1496, 1497, 1501, 1503,  
8 2071, 2072, 2411, 2501, 2512 of title 28). For purposes  
9 of the Contract Disputes Act of 1978 (41  
10 U.S.C. 601 and following), the Commissioner shall  
11 be deemed to be the agency head with respect to  
12 contract claims arising with respect to the Office.

13           “(3) TORT CLAIMS.—Any action, suit, or proceeding  
14 against the Office founded upon tort shall be  
15 subject to the limitations and exclusive remedies provided  
16 in section 1346(b) and sections 2671 through  
17 2680 of title 28, whether or not such tort claims are  
18 cognizable under section 1346(b) of title 28.

19           “(4) PROHIBITION ON ATTACHMENT, LIENS,  
20 ETC.—No attachment, garnishment, lien, or similar  
21 process, intermediate or final, in law or equity, may  
22 be issued against property of the Office.

23           “(5) SUBSTITUTION OF OFFICE AS PARTY.—  
24 The Office shall be substituted as defendant in any  
25 civil action, suit, or proceeding against an officer or



1 employee of the Office, if the Office determines that  
2 the employee was acting within the scope of the offi-  
3 cer or employee's employment with the Office. If the  
4 Office refuses to certify scope of employment, the of-  
5 ficer or employee may at any time before trial peti-  
6 tion the court to find and certify that the officer or  
7 employee was acting within the scope of the officer  
8 or employee's employment. Upon certification by the  
9 court, the Office shall be substituted as the party  
10 defendant. A copy of the petition shall be served  
11 upon the Office.

12 "(b) RELATIONSHIP WITH JUSTICE DEPARTMENT.—

13 "(1) EXERCISE BY OFFICE OF ATTORNEY GEN-  
14 ERAL'S AUTHORITIES.—Except as provided in this  
15 section, in relation to all judicial proceedings in  
16 which the Office or an officer or employee thereof is  
17 a party or in which the officer or employee thereof  
18 is interested and which arise from or relate to offi-  
19 cers or employees thereof acting within the scope of  
20 their employment, torts, contracts, property, reg-  
21 istration of patent and trademark practitioners, pat-  
22 ents or trademarks, or fees, the officer or employee  
23 thereof may exercise, without prior authorization  
24 from the Attorney General, the authorities and du-  
25 ties that otherwise would be exercised by the Attor-

1       ney General on behalf of the officer or employee  
2       thereof under title 28, and other laws. In all other  
3       judicial or administrative proceedings in which the  
4       Office or an officer or employee of the Office is a  
5       party or is interested, the Office may exercise these  
6       authorities and duties only after obtaining author-  
7       ization from the Attorney General.

8               “(2) APPEARANCES BY ATTORNEY GENERAL.—  
9       The Attorney General may file an appearance on be-  
10      half of the Office or an employee of the Office, with-  
11      out the consent of the Office, in any suit in which  
12      the Office is a party and represent the Office with  
13      exclusive authority in the conduct, settlement, or  
14      compromise of that suit.

15             “(3) CONSULTATIONS WITH AND ASSISTANCE  
16      BY ATTORNEY GENERAL.—The Office may consult  
17      with the Attorney General concerning any legal mat-  
18      ter, and the Attorney General shall provide advice  
19      and assistance to the Office, including representing  
20      the Office in litigation, if requested by the Office.

21             “(4) REPRESENTATION BEFORE SUPREME  
22      COURT.—The Attorney General shall represent the  
23      Office in all cases before the United States Supreme  
24      Court.

1           “(5) QUALIFICATIONS OF ATTORNEYS.—An at-  
2           torney admitted to practice to the bar of the highest  
3           court of at least one State in the United States or  
4           the District of Columbia and appointed by the Office  
5           may represent the Office in any legal proceeding in  
6           which the Office or an officer or employee of the Of-  
7           fice is a party or interested, regardless of whether  
8           the attorney is a resident of the jurisdiction in which  
9           the proceeding is held and notwithstanding any  
10          other prerequisites of qualification or appearance re-  
11          quired by the court or administrative body.”.

12 **SEC. 109. ANNUAL REPORT OF COMMISSIONER.**

13          Section 15 of title 35, United States Code, as redesign-  
14          nated by section 108 of this Act, is amended to read as  
15          follows:

16 **“§ 15. Annual report to Congress**

17          “The Commissioner shall report to the Congress, not  
18          later than 90 days after the end of each fiscal year, the  
19          moneys received and expended by the Office, the purposes  
20          for which the moneys were spent, the quality and quantity  
21          of the work of the Office, and other information relating  
22          to the Office.”.

23 **SEC. 110. SUSPENSION OR EXCLUSION FROM PRACTICE.**

24          Section 32 of title 35, United States Code, is amend-  
25          ed by inserting before the last sentence the following: “The

1 Commissioner shall have the discretion to designate any  
2 officer or employee of the Patent and Trademark Office  
3 to conduct the hearing required by this section.”.

4 **SEC. 111. FUNDING.**

5 Section 42 of title 35, United States Code, is amend-  
6 ed to read as follows:

7 **“§ 42. Patent and Trademark Office funding**

8 “(a) FEES PAYABLE TO THE OFFICE.—All fees for  
9 services performed by or materials furnished by the Patent  
10 and Trademark Office shall be payable to the Office.

11 “(b) USE OF MONEYS.—Moneys of the Patent and  
12 Trademark Office not otherwise used to carry out the  
13 functions of the Office shall be kept in cash on hand or  
14 on deposit, or invested in obligations of the United States  
15 or guaranteed by the United States, or in obligations or  
16 other instruments which are lawful investments for fidu-  
17 ciary, trust, or public funds. Fees available to the Commis-  
18 sioner under this title shall be used exclusively for the  
19 processing of patent applications and for other services  
20 and materials relating to patents. Fees available to the  
21 Commissioner under section 31 of the Act of July 5, 1946  
22 (commonly referred to as the ‘Trademark Act of 1946’)  
23 (15 U.S.C. 1113) shall be used exclusively for the process-  
24 ing of trademark registrations and for other services and  
25 materials relating to trademarks.

1       “(c) BORROWING AUTHORITY.—The Patent and  
2 Trademark Office is authorized to issue from time to time  
3 for purchase by the Secretary of the Treasury its debentures,  
4 bonds, notes, and other evidences of indebtedness  
5 (hereafter in this subsection referred to as ‘obligations’)  
6 in an amount not exceeding \$2,000,000 outstanding at  
7 any one time, to assist in financing its activities. Such ob-  
8 ligations shall be redeemable at the option of the Office  
9 before maturity in the manner stipulated in such obliga-  
10 tions and shall have such maturity as is determined by  
11 the Office with the approval of the Secretary of the Treas-  
12 ury. Each such obligation issued to the Treasury shall  
13 bear interest at a rate not less than the current yield on  
14 outstanding marketable obligations of the United States  
15 of comparable maturity during the month preceding the  
16 issuance of the obligation as determined by the Secretary  
17 of the Treasury. The Secretary of the Treasury shall pur-  
18 chase any obligations of the Office issued under this sub-  
19 section and for such purpose the Secretary of the Treasury  
20 is authorized to use as a public-debt transaction the pro-  
21 ceeds of any securities issued under chapter 31 of title  
22 31, and the purposes for which securities may be issued  
23 under that chapter are extended to include such purpose.  
24 Payment under this subsection of the purchase price of  
25 such obligations of the Patent and Trademark Office shall

1 be treated as public debt transactions of the United  
2 States.”.

3 **SEC. 112. AUDITS.**

4 Chapter 4 of part I title 35, United States Code, is  
5 amended by adding at the end the following new section:

6 **“§ 43. Audits**

7 “(a) IN GENERAL.—Financial statements of the Pat-  
8 ent and Trademark Office shall be prepared on an annual  
9 basis in accordance with generally accepted accounting  
10 principles. Such statements shall be audited by an inde-  
11 pendent certified public accountant chosen by the Sec-  
12 retary. The audit shall be conducted in accordance with  
13 standards that are consistent with generally accepted Gov-  
14 ernment auditing standards and other standards estab-  
15 lished by the Comptroller General, and with the generally  
16 accepted auditing standards of the private sector, to the  
17 extent feasible.

18 “(b) REVIEW BY COMPTROLLER GENERAL.—The  
19 Comptroller General may review any audit of the financial  
20 statement of the Patent and Trademark Office that is con-  
21 ducted under subsection (a). The Comptroller General  
22 shall report to the Congress and the Office the results of  
23 any such review and shall include in such report appro-  
24 priate recommendations.

1       “(c) AUDIT BY COMPTROLLER GENERAL.—The  
2 Comptroller General may audit the financial statements  
3 of the Office and such audit shall be in lieu of the audit  
4 required by subsection (a). The Office shall reimburse the  
5 Comptroller General for the cost of any audit conducted  
6 under this subsection.

7       “(d) ACCESS TO OFFICE RECORDS.—All books, fi-  
8 nancial records, report files, memoranda, and other prop-  
9 erty that the Comptroller General deems necessary for the  
10 performance of any audit shall be made available to the  
11 Comptroller General.

12       “(e) APPLICABILITY IN LIEU OF TITLE 31 PROVI-  
13 SIONS.—This section applies to the Office in lieu of the  
14 provisions of section 9105 of title 31.”.

15 **SEC. 113. TRANSFER.**

16       (a) TRANSFER OF FUNCTIONS.—Except as otherwise  
17 provided in this Act, there are transferred to, and vested  
18 in, the Patent and Trademark Office all functions, powers,  
19 and duties vested by law in the Secretary of Commerce  
20 or the Department of Commerce or in the officers or com-  
21 ponents in the Department of Commerce with respect to  
22 the authority to grant patents and register trademarks,  
23 and in the Patent and Trademark Office, as in effect on  
24 the day before the effective date of this Act, and in the  
25 officers and components of such Office.

1 (b) TRANSFER OF FUNDS AND PROPERTY.—The  
2 Secretary of Commerce shall transfer to the Patent and  
3 Trademark Office, on the effective date of this Act, so  
4 much of the assets, liabilities, contracts, property, records,  
5 and unexpended and unobligated balances of appropria-  
6 tions, authorizations, allocations, and other funds em-  
7 ployed, held, used, arising from, available to, or to be  
8 made available to the Department of Commerce, including  
9 funds set aside for accounts receivable which are related  
10 to functions, powers, and duties which are vested in the  
11 Patent and Trademark Office by this Act.

12 (c) TRANSFER OF SURCHARGE FUND.—On the effec-  
13 tive date of this Act, there are transferred to the Patent  
14 and Trademark Office those residual and unappropriated  
15 balances remaining as of the effective date within the Pat-  
16 ent and Trademark Office Surcharge Fund established by  
17 section 10101(b) of the Omnibus Budget Reconciliation  
18 Act of 1990 (35 U.S.C. 41 note).

19 **TITLE II—EFFECTIVE DATE;**  
20 **TECHNICAL AMENDMENTS**

21 **SEC. 201. EFFECTIVE DATE.**

22 This Act shall take effect 6 months after the date  
23 of the enactment of this Act.

24 **SEC. 202. TECHNICAL AND CONFORMING AMENDMENTS.**

25 (a) AMENDMENTS TO TITLE 35.—



1 (1) The table of contents for part I of title 35,  
2 United States Code, is amended by amending the  
3 item relating to chapter 1 to read as follows:

4 (2) The table of sections for chapter 1 of title  
5 35, United States Code, is amended to read as fol-  
6 lows:

“1. Establishment, Officers and Employees, Functions ..... 1.”

7 **“CHAPTER 1—ESTABLISHMENT, OFFICERS**  
8 **AND EMPLOYEES FUNCTIONS**

“Sec.

- “1. Establishment.
- “2. Powers and duties.
- “3. Officers and employees.
- “4. Restrictions on officers and employees as to interest in patents.
- “5. Patent and Trademark Office Management Advisory Board.
- “6. Duties of Commissioner.
- “7. Board of Patent Appeals and Interferences.
- “8. Suits by and against the Corporation.
- “9. Library.
- “10. Classification of patents.
- “11. Certified copies of records.
- “12. Publications.
- “13. Exchange of copies of patents with foreign countries.
- “14. Copies of patents for public libraries.
- “15. Annual report to Congress.”.

9 (3) The table of contents for chapter 4 of part I of  
10 title 35, United States Code, is amended by adding at the  
11 end the following new item:

“43. Audits.”.

12 (b) OTHER PROVISIONS OF LAW.—

13 (1) Section 9101(3) of title 31, United States  
14 Code, is amended by adding at the end the follow-  
15 ing:

1                   “(O) the Patent and Trademark Office.”.

2                   (2) Section 602(d) of the Federal Property and  
3                   Administrative Services Act of 1949 (40 U.S.C. 474)  
4                   is amended—

5                   (A) in paragraph (20) by striking “or”  
6                   after the semicolon;

7                   (B) in paragraph (21) by striking the pe-  
8                   riod and inserting “; or”; and

9                   (C) by adding at the end the following:

10                   “(22) the Patent and Trademark Office.”.

11                   (3) Section 500(e) of title 5, United States  
12                   Code (5 U.S.C. 500(e)) is amended by striking  
13                   “Patent Office” and inserting “Patent and Trade-  
14                   mark Office”.

15                   (4) Section 5102(c)(23) of title 5, United  
16                   States Code, is amended by striking “Department of  
17                   Commerce”.

18                   (5) Section 5316 of title 5, United States Code  
19                   (5 U.S.C. 5316) is amended by striking “Commis-  
20                   sioner of Patents, Department of Commerce.”,  
21                   “Deputy Commissioner of Patents and Trade-  
22                   marks.”, “Assistant Commissioner for Patents.”,  
23                   and “Assistant Commissioner for Trademarks.”.

24                   (6) Section 4 of the Act of February 14, 1903  
25                   (15 U.S.C. 1511) is amended by striking “(d) Pat-

1 ent and Trademark Office;” and redesignating sub-  
2 sections (a) through (g) as paragraphs (1) through  
3 (6), respectively.

4 (7) The Act of April 12, 1892 (27 Stat. 395;  
5 20 U.S.C. 91) is amended by striking “Patent Of-  
6 fice” and inserting “Patent and Trademark Office”.

7 (8) Sections 505(m) and 512(o) of the Federal  
8 Food, Drug, and Cosmetic Act (21 U.S.C. 355(m)  
9 and 360b(o)) are each amended by striking “of the  
10 Department of Commerce”.

11 (9) Section 105(e) of the Federal Alcohol Ad-  
12 ministration Act (27 U.S.C. 205(e)) is amended by  
13 striking “Patent Office” and inserting “Patent and  
14 Trademark Office”.

15 (10) Section 1744 of title 28, United States  
16 Code is amended—

17 (A) by striking “Patent Office” each place  
18 it appears and inserting “Patent and Trade-  
19 mark Office”; and

20 (B) by striking “Commissioner of Patents”  
21 and inserting “Commissioner of Patents and  
22 Trademarks”.

23 (11) Section 1745 of title 28, United States  
24 Code, is amended by striking “United States Patent

1 Office” and inserting “Patent and Trademark Of-  
2 fice”.

3 (12) Section 1928 of title 28, United States  
4 Code, is amended by striking “Patent Office” and  
5 inserting “Patent and Trademark Office”.

6 (13) Section 160 of the Atomic Energy Act of  
7 1954 (42 U.S.C. 2190) is amended—

8 (A) by striking “Patent Office” and insert-  
9 ing “Patent and Trademark Office”; and

10 (B) by striking “Commissioner of Patents”  
11 and inserting “Commissioner of Patents and  
12 Trademarks”.

13 (14) Section 305(c) of the National Aeronautics  
14 and Space Act of 1958 (42 U.S.C. 2457(c)) is  
15 amended by striking “Commissioner of Patents” and  
16 inserting “Commissioner of Patents and Trade-  
17 marks”.

18 (15) Section 12(a) of the Solar Heating and  
19 Cooling Demonstration Act of 1974 (42 U.S.C.  
20 5510(a)) is amended by striking “Commissioner of  
21 the Patent Office” and inserting “Commissioner of  
22 Patents and Trademarks”.

23 (16) Section 1111 of title 44, United States  
24 Code, is amended by striking “Commissioner of Pat-

1       ents” and inserting “Commissioner of Patents and  
2       Trademarks”.

3           (17) Sections 1114 and 1123 of title 44, United  
4       States Code, are each amended by striking “Com-  
5       missioner of Patents”.

6           (18) Sections 1337 and 1338 of title 44, United  
7       States Code, and the items relating to those sections  
8       in the table of contents for chapter 13 of such title,  
9       are repealed.

10          (19) Section 10(i) of the Trading With the  
11       Enemy Act (50 U.S.C. App. 10(i)) is amended by  
12       striking “Commissioner of Patents” and inserting  
13       “Commissioner of Patents and Trademarks”.

14          (20) Section 8G(a)(2) of the Inspector General  
15       Act of 1978 (5 U.S.C. App.) is amended by inserting  
16       “the Patent and Trademark Office,” after “the  
17       Panama Canal Commission,”.

18          (21) Section 255(g)(1)(A) of the Balanced  
19       Budget and Emergency Deficit Control Act of 1985  
20       (2 U.S.C. 905(g)(1)(A)) is amended by inserting  
21       after the item relating to the United States Enrich-  
22       ment Corporation the following new item:

23           “Patent and Trademark Office;”.

24          (22) Section 10101(b)(2)(B) of the Omnibus  
25       Budget Reconciliation Act of 1990 (35 U.S.C. 41

1 note) is amended by striking “, to the extent pro-  
2 vided in appropriation Acts,” and inserting “without  
3 appropriation”.

104TH CONGRESS  
1ST SESSION

# H. R. 1756

To abolish the Department of Commerce.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 7, 1995

Mr. CHRYSLER (for himself, Mr. BROWNBACK, Mr. KASICH, Mr. LIVINGSTON, Mr. SOLOMON, Mr. CRANE, Mr. BOEHNER, Mr. PAXON, Mr. PARKER, Mr. METCALF, Mr. COOLEY, Mrs. CHENOWETH, Mr. NEULMANN, Mr. SCARBOROUGH, Mrs. MYRICK, Mr. KNOLLENBERG, Mr. GUTKNECHT, Mr. LAHOOD, Mr. SANFORD, Mr. GRAHAM, Mr. WELDON of Florida, Mr. HILLEARY, Mr. JONES, Mr. ENSIGN, Mr. CHRISTENSEN, Mr. WELLER, Mr. KLUG, Mr. NETHERCUTT, Mr. MCINTOSH, Mr. STEARNS, Mr. SMITH of Michigan, Mr. RADANOVICH, Mr. SALMON, Mr. CHABOT, Mr. FOX of Pennsylvania, Mr. LARGENT, Mr. BONO, Mr. TLAHART, Mr. CREMEANS, Mr. MILLER of Florida, Mr. HAYWORTH, Mr. HUTCHINSON, Mr. WICKER, Mr. HASTINGS of Washington, Mr. FUNDERBURK, Mr. FRISA, Mr. THORNBERRY, Mrs. WALDHOLTZ, Mr. NORWOOD, Mrs. SEASTRAND, Mr. BASS, Mr. EWING, Mr. SHADEGG, Mr. HOEKSTRA, Mr. CAMP, Mr. LINDER, Mr. UPTON, Mr. WHITE, Mr. RIGGS, Mr. TATE, and Mrs. SMITH of Washington) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committees on Transportation and Infrastructure, Banking and Financial Services, International Relations, National Security, Agriculture, Ways and Means, Government Reform and Oversight, the Judiciary, Science, and Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To abolish the Department of Commerce.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Department of Com-  
3 merce Dismantling Act".

4 **SEC. 2. TABLE OF CONTENTS.**

5 The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.

**TITLE I—ABOLISHMENT OF DEPARTMENT OF COMMERCE**

- Sec. 101. Reestablishment of Department as Commerce Programs Resolution Agency.
- Sec. 102. Functions.
- Sec. 103. Deputy Administrator.
- Sec. 104. Continuation of service of department officers.
- Sec. 105. Reorganization.
- Sec. 106. Abolishment of Commerce Programs Resolution Agency.
- Sec. 107. GAO report.
- Sec. 108. Conforming amendments.
- Sec. 109. Effective date.

**TITLE II—DISPOSITION OF PARTICULAR PROGRAMS, FUNCTIONS,  
AND AGENCIES OF DEPARTMENT OF COMMERCE**

- Sec. 201. Economic development.
- Sec. 202. Export control functions.
- Sec. 203. National security functions.
- Sec. 204. International trade functions.
- Sec. 205. Patent and Trademark Office.
- Sec. 206. Technology Administration.
- Sec. 207. Reorganization of the Bureau of the Census.
- Sec. 208. Reorganization of the Bureau of Economic Analysis.
- Sec. 209. Terminated functions of NTIA.
- Sec. 210. Transfer of spectrum management functions.
- Sec. 211. National Oceanic and Atmospheric Administration.
- Sec. 212. Miscellaneous abolishments.
- Sec. 213. Effective date.
- Sec. 214. Sense of Congress regarding user fees.

**TITLE III—MISCELLANEOUS PROVISIONS**

- Sec. 301. References.
- Sec. 302. Exercise of authorities.
- Sec. 303. Savings provisions.
- Sec. 304. Transfer of assets.
- Sec. 305. Delegation and assignment.
- Sec. 306. Authority of Administrator with respect to functions transferred.
- Sec. 307. Proposed changes in law.
- Sec. 308. Certain vesting of functions considered transfers.
- Sec. 309. Definitions.
- Sec. 310. Limitation on annual expenditures for continued functions.



1           **TITLE I—ABOLISHMENT OF**  
2           **DEPARTMENT OF COMMERCE**

3   **SEC. 101. REESTABLISHMENT OF DEPARTMENT AS COM-**  
4                           **MERCE PROGRAMS RESOLUTION AGENCY.**

5           (a) REESTABLISHMENT.—The Department of Com-  
6 merce is hereby redesignated as the Commerce Programs  
7 Resolution Agency, which shall be an independent agency  
8 in the executive branch of the Government.

9           (b) ADMINISTRATOR.—

10           (1) IN GENERAL.—There shall be at the head  
11 of the Agency an Administrator of the Agency, who  
12 shall be appointed by the President, by and with the  
13 advice and consent of the Senate. The Agency shall  
14 be administered under the supervision and direction  
15 of the Administrator. The Administrator shall re-  
16 ceive compensation at the rate prescribed for level II  
17 of the Executive Schedule under section 5313 of title  
18 5, United States Code.

19           (2) INITIAL APPOINTMENT OF ADMINIS-  
20 TRATOR.—Notwithstanding any other provision of  
21 this Act or any other law, the President may, at any  
22 time after the date of the enactment of this Act, ap-  
23 point an individual to serve as Administrator of the  
24 Commerce Programs Resolution Agency (who may  
25 be the Secretary of Commerce), as such position is

1 established under paragraph (1). An appointment  
2 under this paragraph may not be construed to affect  
3 the position of Secretary of Commerce or the au-  
4 thority of the Secretary before the effective date  
5 specified in section 109(a).

6 (c) DUTIES.—The Administrator shall be responsible  
7 for—

8 (1) the administration and wind-up, during the  
9 wind-up period, of all functions of the Administrator  
10 pursuant to section 102 and the other provisions of  
11 this Act;

12 (2) the administration and wind-up, during the  
13 wind-up period, of any outstanding obligations of the  
14 Federal Government under any programs terminated  
15 or repealed by this Act; and

16 (3) taking such other actions as may be nec-  
17 essary, before the termination date specified in sec-  
18 tion 106(d), to wind up any outstanding affairs of  
19 the Department of Commerce.

20 **SEC. 102. FUNCTIONS.**

21 Except to the extent a function is abolished or vested  
22 in another official or agency by this Act, the Administrator  
23 shall perform all functions that, immediately before the  
24 effective date specified in section 109(a), were functions  
25 of the Department of Commerce (or any office of the De-

1 partment) or were authorized to be performed by the Sec-  
2 retary of Commerce or any other officer or employee of  
3 the Department in the capacity as such officer or em-  
4 ployee.

5 **SEC. 103. DEPUTY ADMINISTRATOR.**

6 The Agency shall have a Deputy Administrator, who  
7 shall--

8 (1) be appointed by and report to the Adminis-  
9 trator; and

10 (2) shall perform such functions as may be del-  
11 egated by the Administrator.

12 **SEC. 104. CONTINUATION OF SERVICE OF DEPARTMENT**  
13 **OFFICERS.**

14 (a) CONTINUATION OF SERVICE OF SECRETARY.—

15 The individual serving on the effective date specified in  
16 section 109(a) as the Secretary of Commerce may serve  
17 and act as Administrator until the date an individual is  
18 appointed under this title to the position of Administrator,  
19 or until the end of the 120-day period provided for in sec-  
20 tion 3348 of title 5, United States Code (relating to limita-  
21 tions on the period of time a vacancy may be filled tempo-  
22 rarily), whichever is earlier.

23 (b) CONTINUATION OF SERVICE OF OTHER OFFI-  
24 CERS.—An individual serving on the effective date speci-  
25 fied in section 109(a) as an officer of the Department of

1 Commerce other than the Secretary of Commerce may  
2 continue to serve and act in an equivalent capacity in the  
3 Agency until the date an individual is appointed under this  
4 title to the position of Administrator, or until the end of  
5 the 120-day period provided for in section 3348 of title  
6 5, United States Code (relating to limitations on the pe-  
7 riod of time a vacancy may be filled temporarily) with re-  
8 spect to that appointment, whichever is earlier.

9 (c) COMPENSATION FOR CONTINUED SERVICE.—Any  
10 person—

11 (1) who serves as the Administrator under sub-  
12 section (a), or

13 (2) who serves under subsection (b),  
14 after the effective date specified in section 109(a) and be-  
15 fore the first appointment of a person as Administrator  
16 shall continue to be compensated for so serving at the rate  
17 at which such person was compensated before such effec-  
18 tive date.

19 **SEC. 105. REORGANIZATION.**

20 The Administrator may allocate or reallocate any  
21 function of the Agency pursuant to this Act among the  
22 officers of the Agency, and may establish, consolidate,  
23 alter, or discontinue in the Commerce Programs Resolu-  
24 tion Agency any organizational entities that were entities

1 of the Department of Commerce, as the Administrator  
2 considers necessary or appropriate.

3 **SEC. 106. ABOLISHMENT OF COMMERCE PROGRAMS RESO-**  
4 **LUTION AGENCY.**

5 (a) **IN GENERAL.**—Effective on the termination date.  
6 specified in subsection (d), the Commerce Programs Reso-  
7 lution Agency is abolished.

8 (b) **ABOLITION OF FUNCTIONS.**—Except for func-  
9 tions transferred or otherwise continued by this Act, all  
10 functions that, immediately before the termination date  
11 specified in subsection (d), were functions of the Com-  
12 merce Programs Resolution Agency are abolished effective  
13 on that termination date.

14 (c) **PLAN FOR WINDING UP AFFAIRS.**—Not later  
15 than the effective date specified in section 109(a), the  
16 President shall submit to the Congress a plan for winding  
17 up the affairs of the Agency in accordance with this Act  
18 and by not later than the termination date specified in  
19 subsection (d).

20 (d) **TERMINATION DATE.**—The termination date  
21 under this subsection is the date that is 3 years after the  
22 date of the enactment of this Act.

23 **SEC. 107. GAO REPORT.**

24 Not later than 180 days after the date of enactment  
25 of this Act, the Comptroller General of the United States

1 shall submit to the Congress a report which shall include  
2 recommendations for the most efficient means of achiev-  
3 ing, in accordance with this Act—

4 (1) the complete abolishment of the Depart-  
5 ment of Commerce; and

6 (2) the termination or transfer or other con-  
7 tinuation of the functions of the Department of  
8 Commerce.

9 **SEC. 108. CONFORMING AMENDMENTS.**

10 (a) **PRESIDENTIAL SUCCESSION.**—Section 19(d)(1)  
11 of title 3, United States Code, is amended by striking  
12 “Secretary of Commerce,”.

13 (b) **EXECUTIVE DEPARTMENTS.**—Section 101 of title  
14 5, United States Code, is amended by striking the follow-  
15 ing item:

16 “The Department of Commerce.”.

17 (c) **SECRETARY’S COMPENSATION.**—Section 5312 of  
18 title 5, United States Code, is amended by striking the  
19 following item:

20 “Secretary of Commerce.”.

21 (d) **COMPENSATION FOR POSITIONS AT LEVEL III.**—  
22 Section 5314 of title 5, United States Code, is amended—

23 (1) by striking the following item:

24 “Under Secretary of Commerce, Under Sec-  
25 retary of Commerce for Economic Affairs, Under

1 Secretary of Commerce for Export Administration  
2 and Under Secretary of Commerce for Travel and  
3 Tourism.”;

4 (2) by striking the following item:

5 “Under Secretary of Commerce for Oceans and  
6 Atmosphere, the incumbent of which also serves as  
7 Administrator of the National Oceanic and Atmos-  
8 pheric Administration.”; and

9 (3) by striking the following item:

10 “Under Secretary of Commerce for Tech-  
11 nology.”.

12 (e) COMPENSATION FOR POSITIONS AT LEVEL IV.—

13 Section 5315 of title 5, United States Code, is amended—

14 (1) by striking the following items:

15 “Assistant Secretaries of Commerce (11).”;

16 (2) by striking the following item:

17 “General Counsel of the Department of Com-  
18 merce.”;

19 (3) by striking the following item:

20 “Associate Secretary of Commerce for Oceans  
21 and Atmosphere, the incumbent of which also serves  
22 as Deputy Administrator of the National Oceanic  
23 and Atmospheric Administration.”;

24 (4) by striking the following item:

1 "Director, National Institute of Standards and  
2 Technology, Department of Commerce.";

3 (5) by striking the following item:

4 "Inspector General, Department of Com-  
5 merce.";

6 (6) by striking the following item:

7 "Chief Financial Officer, Department of Com-  
8 merce."; and

9 (7) by striking the following item:

10 "Director, Bureau of the Census, Department  
11 of Commerce.".

12 (f) COMPENSATION FOR POSITIONS AT LEVEL V.—

13 Section 5316 of title 5, United States Code, is amended—

14 (1) by striking the following item:

15 "Director, United States Travel Service, De-  
16 partment of Commerce."; and

17 (2) by striking the following item:

18 "National Export Expansion Coordinator, De-  
19 partment of Commerce.".

20 (g) INSPECTOR GENERAL ACT OF 1978.—The In-  
21 spector General Act of 1978 (5 U.S.C. App.) is amend-  
22 ed—

23 (1) in section 9(a)(1), by striking subparagraph  
24 (B);



1 (2) in section 11(1), by striking "Commerce.";

2 and

3 (3) in section 11(2), by striking "Commerce.";

4 **SEC. 109. EFFECTIVE DATE.**

5 (a) **IN GENERAL.**—Except as provided in subsection

6 (b), this title shall take effect on the date that is 6 months

7 after the date of the enactment of this Act.

8 (b) **PROVISIONS EFFECTIVE ON DATE OF ENACT-**

9 **MENT.**—The following provisions of this title shall take ef-

10 fect on the date of the enactment of this Act:

11 (1) Section 101(b).

12 (2) Section 106(c).

13 (3) Section 107.

14 **TITLE II—DISPOSITION OF PAR-**  
15 **TICULAR PROGRAMS, FUNC-**  
16 **TIONS, AND AGENCIES OF DE-**  
17 **PARTMENT OF COMMERCE**

18 **SEC. 201. ECONOMIC DEVELOPMENT.**

19 (a) **TERMINATED FUNCTIONS.**—The Public Works

20 and Economic Development Act of 1965 (42 U.S.C. 3121

21 et seq.) is repealed.

22 (b) **TRANSFER OF FINANCIAL OBLIGATIONS OWED**

23 **TO THE DEPARTMENT.**—There are transferred to the Sec-

24 retary of the Treasury the loans, notes, bonds, debentures,

25 securities, and other financial obligations owned by the

1 Department of Commerce under the Public Works and  
2 Economic Development Act of 1965, together with all as-  
3 sets or other rights (including security interests) incident  
4 thereto, and all liabilities related thereto. There are as-  
5 signed to the Secretary of the Treasury the functions,  
6 powers, and abilities vested in or delegated to the Sec-  
7 retary of Commerce or the Department of Commerce to  
8 manage, service, collect, sell, dispose of, or otherwise real-  
9 ize proceeds on obligations owed to the Department of  
10 Commerce under authority of such Act with respect to any  
11 loans, obligations, or guarantees made or issued by the  
12 Department of Commerce pursuant to such Act.

13 (c) AUDIT.—Not later than 18 months after the date  
14 of the enactment of this Act, the Comptroller General shall  
15 conduct an audit of all grants made or issued by the De-  
16 partment of Commerce under the Public Works and Eco-  
17 nomic Development Act of 1965 in fiscal year 1995 and  
18 all loans, obligations, and guarantees and shall transmit  
19 to Congress a report on the results of such audit.

20 **SEC. 202. EXPORT CONTROL FUNCTIONS.**

21 (a) TRANSFER TO SECRETARY OF STATE.—

22 (1) IN GENERAL.—Except as provided in this  
23 section, all functions of the Secretary of Commerce,  
24 the Under Secretary of Commerce for Export Ad-  
25 ministration, the 2 Assistant Secretaries of Com-

1 merce appointed under section 15(a) of the Export  
2 Administration Act of 1979 (50 U.S.C. 2414(a)),  
3 and the Department of Commerce, on the day before  
4 the effective date specified in section 109(a), under  
5 the Export Administration Act of 1979 are trans-  
6 ferred to the Secretary of State.

7 (2) CONSULTATION WITH USTR.—The Sec-  
8 retary of State shall consult with the United States  
9 Trade Representative with respect to licensing deci-  
10 sions under the Export Administration Act of 1979.

11 (b) SHORT SUPPLY CONTROLS.—All functions of the  
12 Secretary of Commerce, on the day before the effective  
13 date specified in section 109(a), under section 7 of the  
14 Export Administration Act of 1979 (50 U.S.C. 2406), and  
15 under all other provisions of that Act to the extent that  
16 such provisions apply to section 7, are transferred to the  
17 President.

18 (c) ENFORCEMENT.—

19 (1) GENERAL TRANSFER.—All functions of the  
20 Secretary of Commerce and the Department of Com-  
21 merce, on the day before the effective date specified  
22 in section 109(a), under sections 11(c), 12, and 13  
23 (c), (d), and (e) of the Export Administration Act of  
24 1979 (50 U.S.C. App. 2410(c), 2411, and 2412 (c),

1 (d), and (e)) are transferred to the Secretary of the  
2 Treasury.

3 (2) TRANSFER OF ENFORCEMENT PERSON-  
4 NEL.—Not more than 60 United States special  
5 agents of the Bureau of Export Administration of  
6 the Department of Commerce who, on the day be-  
7 fore the effective date specified in section 109(a),  
8 were assigned to perform functions under section  
9 12(a) of the Export Administration Act of 1979 may  
10 be transferred to the Customs Service to carry out  
11 functions transferred by paragraph (1). The Direc-  
12 tor of the Office of Management and Budget shall  
13 determine the special agents to be transferred under  
14 this paragraph.

15 (d) ANTI-BOYCOTT COMPLIANCE.—All functions of  
16 the Secretary of Commerce and the Department of Com-  
17 merce, on the day before the effective date specified in  
18 section 109(a), under section 8 of the Export Administra-  
19 tion Act of 1979 (50 U.S.C. 2407), and under all other  
20 provisions of that Act to the extent that such provisions  
21 apply to section 8, are transferred to the Attorney Gen-  
22 eral.

23 (e) TERMINATION OF OFFICE OF FOREIGN AVAIL-  
24 ABILITY; APPOINTMENT OF INDUSTRIES BOARD.—

1 (1) TERMINATION OF OFFICE.—(A) The Office  
2 of Foreign Availability established under section  
3 5(f)(6) of the Export Administration Act of 1979  
4 (50 U.S.C. 2404(f)(6)) is abolished.

5 (2) CONFORMING AMENDMENT.—Section 5(f)  
6 of the Export Administration Act of 1979 (50  
7 U.S.C. App. 2404(f)) is amended by striking para-  
8 graph (6).

9 (3) APPOINTMENT OF INDUSTRIES BOARD.—  
10 The President shall appoint an industries board,  
11 composed of representatives of industries affected by  
12 matters relating to foreign availability under the Ex-  
13 port Administration Act of 1979, to advise the Sec-  
14 retary of State with respect to such matters, except  
15 that no Federal funds may be made available to the  
16 industries board to carry out its functions.

17 (f) BUYING POWER MAINTENANCE ACCOUNT.—The  
18 authority of the Secretary of Commerce under section 108  
19 of title I of Public Law 100-202 (101 Stat. 1329-7) to  
20 establish a Buying Power Maintenance account is trans-  
21 ferred to the Secretary of State for purposes of carrying  
22 out functions under the Export Administration Act of  
23 1979 that are transferred to the Secretary of State under  
24 this section.

25 (g) TECHNICAL AND CONFORMING AMENDMENTS.—

1           (1) Section 15(a) of the Export Administration  
2 Act of 1979 (50 U.S.C. 2414(a)) is repealed.

3           (2) The Office of the Under Secretary of Com-  
4 merce for Export Administration is abolished.

5 **SEC. 203. NATIONAL SECURITY FUNCTIONS.**

6       (a) **TRANSFER OF FUNCTIONS.**—Functions of the  
7 Secretary of Commerce immediately before the effective  
8 date specified in section 109(a)—

9           (1) under section 232 of the Trade Expansion  
10 Act of 1962 (19 U.S.C. 1862) are transferred to the  
11 International Trade Commission;

12           (2) under section 309 of the Defense Produc-  
13 tion Act of 1950 (50 U.S.C. App. 2099) are trans-  
14 ferred to the Secretary of Defense; and

15           (3) under section 722 of the Defense Produc-  
16 tion Act of 1950 (50 U.S.C. App. 2171) are trans-  
17 ferred to the Secretary of the Treasury.

18       (b) **NATIONAL DEFENSE TECHNOLOGY AND INDUS-**  
19 **TRIAL BASE COUNCIL.**—Section 2502(b) of title 10, Unit-  
20 ed States Code, is amended by striking paragraph (3) and  
21 redesignating paragraphs (4) and (5) as paragraphs (3)  
22 and (4), respectively.

23       (c) **APPOINTMENT OF COMMITTEES OF INDUSTRY**  
24 **REPRESENTATIVES.**—The President should appoint com-  
25 mittees composed of representatives of appropriate indus-

1 tries to advise the National Security Council with respect  
2 to those matters affecting industry addressed by the Sec-  
3 retary of Commerce to the National Security Council be-  
4 fore the effective date specified in section 109(a).

5 **SEC. 204. INTERNATIONAL TRADE FUNCTIONS.**

6 (a) **TARIFF ACT OF 1930; URUGUAY ROUND AGREE-**  
7 **MENTS ACT.—**

8 (1) **TRANSFER TO UNITED STATES TRADE REP-**  
9 **RESENTATIVE.—**All functions of the International  
10 Trade Administration of the Department of Com-  
11 merce, immediately before the effective date speci-  
12 fied in section 109(a), under titles III and VII of the  
13 Tariff Act of 1930, and all functions of the admin-  
14 istering authority or the Secretary of Commerce  
15 under the Uruguay Round Agreements Act, are  
16 transferred to the United States Trade Representa-  
17 tive.

18 (2) **CONFORMING AMENDMENT.—**Section  
19 771(1) of the Tariff Act of 1930 (19 U.S.C.  
20 1677(1)) is amended by striking "Secretary of Com-  
21 merce" and inserting "United States Trade Rep-  
22 resentative".

23 (b) **FOREIGN TRADE ZONES BOARD.—**Subsection (b)  
24 of the first section of the Act of June 18, 1934 (commonly  
25 known as the "Foreign Trade Zones Act") (19 U.S.C.

1 81a(b)) is amended by striking “Secretary of Commerce,  
2 who shall be chairman and executive officer of the Board,  
3 the Secretary of the Treasury” and inserting “Secretary  
4 of the Treasury, who shall be chairman and executive offi-  
5 cer of the Board, the United States Trade Representa-  
6 tive”.

7 (c) UNITED STATES AND FOREIGN COMMERCIAL  
8 SERVICE.—

9 (1) RENAMING AND ABOLITION OF CERTAIN  
10 FUNCTIONS.—The United States and Foreign Com-  
11 mercial Service shall, upon the effective date speci-  
12 fied in section 109(a), be known as the “United  
13 States Foreign Commercial Service” (hereafter in  
14 this subsection referred to as the “Commercial Serv-  
15 ice”). All operations of the Commercial Service in  
16 the United States (other than those performed at  
17 the headquarters office referred to in section  
18 2301(c) of the Export Enhancement Act of 1988  
19 (15 U.S.C. 4721(c))) with respect to the foreign op-  
20 erations of the Commercial Service) are abolished.

21 (2) TRANSFER TO USTR.—The Commercial  
22 Service and its functions are transferred to the Unit-  
23 ed States Trade Representative. All functions per-  
24 formed immediately before the effective date speci-  
25 fied in section 109(a) by the Secretary of Commerce



1 or the Department of Commerce with respect to the  
2 Commercial Service are transferred to the United  
3 States Trade Representative.

4 (3) DIRECTOR GENERAL.—(A) The head of the  
5 Commercial Service shall, as of the effective date  
6 specified in section 109(a), be the Director General  
7 of the United States Foreign Commercial Service.

8 (B) Section 5315 of title 5, United States Code,  
9 is amended by striking “Assistant Secretary of Com-  
10 merce and Director General of the United States  
11 and Foreign Commercial Service” and inserting “Di-  
12 rector General of the United States Foreign Com-  
13 mercial Service.”.

14 (C) The individual serving as Assistant Sec-  
15 retary of Commerce and Director General of the  
16 United States and Foreign Commercial Service im-  
17 mediately before the effective date specified in sec-  
18 tion 109(a) may serve as the Director General of the  
19 United States Foreign Commercial Service on and  
20 after such effective date until a successor has taken  
21 office. Compensation for any service under this sub-  
22 paragraph shall be at the rate at which the individ-  
23 ual was compensated immediately before the effec-  
24 tive date specified in section 109(a).

1           (4) TRANSFER OF COMMERCIAL SERVICE OFFI-  
2           CERS.—The transfer to the United States Trade  
3           Representative pursuant to this section of any Com-  
4           mercial Service Officer serving immediately before  
5           the effective date specified in section 109(a) shall  
6           not cause such officer to be reduced in rank, grade,  
7           or compensation.

8           (d) EXPORT PROMOTION PROGRAMS.—

9           (1) TRANSFER.—All export promotion pro-  
10          grams (as defined in section 201(d) of the Export  
11          Administration Amendments Act of 1985 (15 U.S.C.  
12          4051(d))) carried out by the Secretary of Commerce  
13          or the Department of Commerce immediately before  
14          the effective date specified in section 109(a) are  
15          transferred to the United States Trade Representa-  
16          tive.

17          (2) PRIVATE FUNDING.—With respect to any  
18          program transferred under paragraph (1), no funds  
19          made available to the United States Trade Rep-  
20          resentative may be used in carrying out such pro-  
21          gram, but the United States Trade Representative  
22          may require the persons to whom services are pro-  
23          vided by the Office of the United States Trade Rep-  
24          resentative under such program to pay for such serv-  
25          ices.

1 (e) TRADE INFORMATION.—All functions of the Sec-  
2 retary of Commerce under the International Investment  
3 and Trade in Services Survey Act (22 U.S.C. 3101 and  
4 following) are transferrèd to the Secretary of the Treas-  
5 ury.

6 (f) INTERNATIONAL ECONOMIC POLICY.—All func-  
7 tions performed by the Assistant Secretary of Commerce  
8 for International Economic Policy and the Office of Inter-  
9 national Economic Policy of the Department of Commerce  
10 immediately before the effective date specified in section  
11 109(a) are abolished.

12 (g) FUNCTIONS WITH RESPECT TO TEXTILE AGREE-  
13 MENTS.—

14 (1) TRANSFER OF FUNCTIONS.—Notwithstand-  
15 ing the provisions of Executive Order 11651 and  
16 Executive Order 12475 (7 U.S.C. 1854 note), the  
17 functions of the Committee for the Implementation  
18 of Textile Agreements (hereafter in this subsection  
19 referred to as "CITA") are transferred as follows:

20 (A) All functions related to policy formula-  
21 tion for textile and apparel trade, including the  
22 negotiation and implementation of textile and  
23 apparel trade agreements, and all related activi-  
24 ties performed by CITA immediately before the  
25 effective date specified in section 109(a), and

1 not specified in paragraphs (2) through (4), are  
2 transferred to the United States Trade Rep-  
3 resentative.

4 (B) All functions related to economic anal-  
5 ysis of textile and apparel trade patterns, deter-  
6 mination of serious damage, or actual threat  
7 thereof, to domestic United States industry and  
8 related safeguards matters, including the tran-  
9 sitional safeguard provisions under Article 6 of  
10 the Agreement on Textiles and Clothing re-  
11 ferred to in section 101(d)(4) of the Uruguay  
12 Round Agreements Act (19 U.S.C. 3511(d)(4)),  
13 and analysis of the impact of foreign tariff and  
14 nontariff barriers on textile and apparel trade,  
15 and all related activities performed by CITA  
16 immediately before the effective date specified  
17 in section 109(a), are transferred to the Inter-  
18 national Trade Commission.

19 (C) All functions related to the promotion  
20 and foreign market expansion of United States  
21 textile and apparel production are transferred  
22 to the United States Foreign Commercial Serv-  
23 ice.

24 (D) All functions related to monitoring  
25 quota utilization and enforcement, and actions

1 to address the circumvention of quotas, as de-  
2 scribed in the statement of administrative ac-  
3 tion accompanying the Uruguay Round Agree-  
4 ments (as defined in section 2 of the Uruguay  
5 Round Agreements Act (19 U.S.C. 3501)), are  
6 transferred to the Secretary of the Treasury.

7 (2) ABOLITION OF CITA.—CITA is abolished.

8 (h) FAIR TRADE IN AUTO PARTS.—All functions of  
9 the Secretary of Commerce under the Fair Trade in Auto  
10 Parts Act of 1988 (15 U.S.C. 4701 and following) are  
11 transferred to the International Trade Commission.

12 (i) OTHER TRADE FUNCTIONS.—

13 (1) INTERAGENCY TRADE ORGANIZATION.—The  
14 President shall provide for the direct participation  
15 by representatives of industry on the Interagency  
16 Trade Organization established under section 242 of  
17 the Trade Expansion Act of 1962 (19 U.S.C. 1872),  
18 to carry out appropriate functions of the Secretary  
19 of Commerce as a member of such organization be-  
20 fore the effective date specified in section 109(a).

21 (2) EXPORT TRADING COMPANIES.—(A) The  
22 functions of the Secretary of Commerce under the  
23 Export Trading Company Act of 1982 (15 U.S.C.  
24 4001–4003), and the Office of Export Trade estab-  
25 lished under section 104 of that Act, are abolished.

1 (B) The functions of the Secretary of Com-  
2 merce under title III of the Act of October 8, 1982  
3 (15 U.S.C. 4011 and following), are transferred to  
4 the Secretary of the Treasury.

5 (C) CONFORMING AMENDMENTS.—(i) The Ex-  
6 port Trading Company Act of 1982 (15 U.S.C.  
7 4001–4003) is repealed.

8 (ii) The section heading for section 301 of the  
9 Act of October 8, 1982 (15 U.S.C. 4011), is amend-  
10 ed by striking “COMMERCE” and inserting “TREAS-  
11 URY”.

12 (iii) Section 311(7) of the Act of October 8,  
13 1982 (15 U.S.C. 4021), is amended by striking  
14 “Commerce” and inserting “Treasury”.

15 (j) APPOINTMENT OF INDUSTRIES BOARDS.—The  
16 President shall appoint industries boards, composed of  
17 representatives of industries in the private sector, to ad-  
18 vise the Secretary of the Treasury and the United States  
19 Trade Representative with respect to functions transferred  
20 to them under this section.

21 (k) GIFTS AND BEQUESTS.—

22 (1) IN GENERAL.—The Secretary of State, the  
23 Secretary of the Treasury, and the United States  
24 Trade Representative are authorized to accept, hold,  
25 administer, and utilize gifts and bequests of prop-

1 erty, both real and personal, for the purpose of aid-  
2 ing or facilitating the performance of functions  
3 transferred to them under this section and section  
4 202. Gifts and bequests of money and the proceeds  
5 from sales of other property received as gifts or be-  
6 quests shall be deposited in the United States Treas-  
7 ury in a separate fund and shall be disbursed on  
8 order of the Secretary of State, the Secretary of the  
9 Treasury, or the United States Trade Representa-  
10 tive. Property accepted pursuant to this paragraph,  
11 and the proceeds thereof, shall be used as nearly as  
12 possible in accordance with the terms of the gift or  
13 bequest.

14 (2) TAX TREATMENT.—For the purpose of Fed-  
15 eral income, estate, and gift taxes, and State taxes,  
16 property accepted under subsection (a) shall be con-  
17 sidered a gift or bequest to or for use of the United  
18 States.

19 (3) INVESTMENT.—The Secretary of the Treas-  
20 ury may invest and reinvest in securities of the  
21 United States or in securities guaranteed as to prin-  
22 cipal and interest by the United States any moneys  
23 contained in the fund provided for in subsection (a).  
24 Income accruing from such securities, and from any  
25 other property held by the Secretary of State, the

1 Secretary of the Treasury, or the United States  
2 Trade Representative pursuant to subsection (a).  
3 shall be deposited to the credit of the fund, and shall  
4 be disbursed upon order of the Secretary of State,  
5 the Secretary of the Treasury, or the United States  
6 Trade Representative.

7 (l) INFORMATION SILARING.—It is the sense of the  
8 Congress that any department or agency of the United  
9 States that compiles information on international econom-  
10 ics or trade make that information available to other de-  
11 partments and agencies performing functions relating to  
12 international trade.

13 (m) TRADE ADJUSTMENT ASSISTANCE FOR  
14 FIRMS.—Chapter 3 of title II of the Trade Act of 1974  
15 (19 U.S.C. 2341 and following) and the items relating to  
16 such chapter in the table of contents for that Act, are re-  
17 pealed.

18 **SEC. 205. PATENT AND TRADEMARK OFFICE.**

19 (a) TRANSFER TO DEPARTMENT OF JUSTICE.—Ef-  
20 fective as of the date specified in section 109(a)—

21 (1) the Patent and Trademark Office shall be  
22 transferred to the Department of Justice; and

23 (2) all functions which, immediately before such  
24 date, are functions of the Secretary of Commerce  
25 under title 35, United States Code, or any other



1 provision of law with respect to the functions of the  
2 Patent and Trademark Office, are transferred to the  
3 Attorney General.

4 (b) FUNDING.—

5 (1) COSTS PAID FROM FEES.—All costs of the  
6 activities of the Patent and Trademark Office shall  
7 be paid from fees paid to the Office under title 35,  
8 United States Code, the Act of July 5, 1946 (com-  
9 monly known as the “Trademark Act of 1946”) (15  
10 U.S.C. 1051 and following), section 10101 of the  
11 Omnibus Budget Reconciliation Act of 1990 (35  
12 U.S.C. 41 note), or other provision of law.

13 (2) FUNDS AVAILABLE WITHOUT APPROPRIATION.—(A) Section 42(c) of title 35, United States  
14 Code, is amended by striking “to carry out, to the  
15 extent provided in appropriation Acts,” and insert-  
16 ing “, without appropriation, to carry out”.

17 (B) Section 10101(b)(2)(B) of the Omnibus  
18 Budget Reconciliation Act of 1990 (35 U.S.C. 41  
19 note) is amended by striking “to the extent provided  
20 in appropriation Acts” and inserting “without ap-  
21 propriation”.

22 (c) ADJUSTMENT OF FEES.—Section 41(f) of title  
23 31, United States Code, is amended to read as follows:  
24

1       “(f) The Commissioner may adjust the fees estab-  
2 lished under this section on October 1 of each year to  
3 cover the estimated cost to the activities of the Office.”.

4       (d) SERVICE OF INCUMBENTS.—Those individuals  
5 serving as Commissioner of Patents and Trademarks,  
6 Deputy Commissioner of Patents and Trademarks, Assist-  
7 ant Commissioner of Patents, and Assistant Commis-  
8 sioner of Trademarks, immediately before the effective  
9 date specified in section 109(a), may continue in such of-  
10 fice on and after such effective date until a successor has  
11 taken office. Compensation for any service under this sub-  
12 section shall be at the rate at which the individual was  
13 compensated immediately before the effective date speci-  
14 fied in section 109(a).

15       (e) RULE OF CONSTRUCTION.—For purposes of title  
16 III, the transfer of the Patent and Trademark Office to  
17 the Department of Justice under this section shall be  
18 treated as if it involved a transfer of functions from one  
19 office to another.

20       (f) TECHNICAL AND CONFORMING AMENDMENTS.—

21             (1) Section 1 of title 35, United States Code,  
22       is amended to read as follows:

23       “§ 1. Establishment

24       “The Patent and Trademark Office is an agency of  
25 the United States within the Department of Justice, where

1 records, books, drawings, specifications, and other papers  
2 and things pertaining to patents and trademark registra-  
3 tions shall be kept and preserved, except as otherwise pro-  
4 vided by law.”.

5 (2) Title 35, United States Code, is amended by  
6 striking “Secretary of Commerce” each place it ap-  
7 pears and inserting “Attorney General”.

8 (3) Section 3 of title 35, United States Code,  
9 is amended by striking subsection (d).

10 (4) Section 5316 of title 5, United States Code,  
11 is amended by striking

12 “Commissioner of Patents, Department of  
13 Commerce.”

14 and inserting

15 “Commissioner of Patents and Trademarks.”.

16 **SEC. 206. TECHNOLOGY ADMINISTRATION.**

17 (a) **TECHNOLOGY ADMINISTRATION.**—

18 (1) **GENERAL RULE.**—Except as otherwise pro-  
19 vided in this section, the Technology Administration  
20 shall be terminated on the effective date specified in  
21 section 213(a).

22 (2) **OFFICE OF TECHNOLOGY POLICY.**—The Of-  
23 fice of Technology Policy is hereby terminated.

24 (b) **NATIONAL INSTITUTE OF STANDARDS AND**  
25 **TECHNOLOGY.**—

1           (1) GENERAL RULE.—Except as otherwise pro-  
2       vided in this subsection, the National Institute of  
3       Standards and Technology (in this subsection re-  
4       ferred to as the “Institute”) shall be transferred to  
5       the National Science Foundation.

6           (2) FUNCTIONS OF DIRECTOR.—Except as oth-  
7       erwise provided in this subsection, upon the transfer  
8       under paragraph (1), the Director of the Institute  
9       shall perform all functions relating to the Institute  
10      that, immediately before the effective date specified  
11      in section 213(a), were functions of the Secretary of  
12      Commerce or the Under Secretary of Commerce for  
13      Technology, including the administration of section  
14      17 of the Stevenson-Wydler Technology Innovation  
15      Act of 1980.

16          (3) LABORATORIES.—(A) The laboratories of  
17      the Institute shall be transferred to the Commerce  
18      Programs Resolution Agency.

19          (B) The Commerce Programs Resolution Agen-  
20      cy shall attempt to sell the property of the labora-  
21      tories of the Institute, within 18 months after the  
22      effective date specified in section 213(a), to a private  
23      sector entity intending to perform substantially the  
24      same functions as were performed by the labora-

1       tories of the Institute immediately before such effec-  
2       tive date.

3           (C) If no offer to purchase property under sub-  
4       paragraph (B) is received within the 18-month pe-  
5       riod described in such subparagraph, the Commerce  
6       Programs Resolution Agency shall submit a report  
7       to the Congress containing recommendations on the  
8       appropriate disposition of the property and functions  
9       of the laboratories of the Institute.

10       (c) NATIONAL TECHNICAL INFORMATION SERV-  
11       ICE.—

12           (1) SALE OF PROPERTY.—The Commerce Pro-  
13       grams Resolution Agency shall attempt to sell the  
14       property of the National Technical Information  
15       Service, within 18 months after the effective date  
16       specified in section 213(a), to a private sector entity  
17       intending to perform substantially the same func-  
18       tions as were performed by the National Technical  
19       Information Service immediately before such effec-  
20       tive date.

21           (2) RECOMMENDATIONS.—If no offer to pur-  
22       chase property under paragraph (1) is received with-  
23       in the 18-month period described in such paragraph,  
24       the Commerce Programs Resolution Agency shall  
25       submit a report to the Congress containing rec-

1       ommendations on the appropriate disposition of the  
2       property and functions of the National Technical In-  
3       formation Service.

4               (3) FUNDING.—No Federal funds may be ap-  
5       propriated for the National Technical Information  
6       Service for any fiscal year after fiscal year 1995.

7       (d) AMENDMENTS.—

8               (1) NATIONAL INSTITUTE OF STANDARDS AND  
9       TECHNOLOGY ACT.—The National Institute of  
10      Standards and Technology Act (15 U.S.C. 271 et  
11      seq.) is amended—

12              (A) in section 2(b), by striking paragraph  
13              (1) and redesignating paragraphs (2) through  
14              (11) as paragraphs (1) through (10), respec-  
15              tively;

16              (B) in section 2(d), by striking “, including  
17              the programs established under sections 25, 26,  
18              and 28 of this Act”;

19              (C) in section 10, by striking “Advanced”  
20              in both the section heading and subsection (a),  
21              and inserting in lieu thereof “Standards and”;  
22              and

23              (D) by striking sections 24, 25, 26, and  
24              28.

1           (2) STEVENSON-WYDLER TECHNOLOGY INNOVA-  
2           TION ACT OF 1980.—The Stevenson-Wydler Tech-  
3           nology Innovation Act of 1980 (15 U.S.C. 3701 et  
4           seq.) is amended—

5                   (A) in section 3, by striking paragraph (2)  
6                   and redesignating paragraphs (3) through (5)  
7                   as paragraphs (2) through (4), respectively;

8                   (B) in section 4, by striking paragraphs  
9                   (1), (4), and (13) and redesignating paragraphs  
10                   (2), (3), (5), (6), (7), (8), (9), (10), (11), and  
11                   (12) as paragraphs (1) through (10), respec-  
12                   tively;

13                   (C) by striking sections 5, 6, 7, 8, 9, and  
14                   10;

15                   (D) in section 11—

16                           (i) by striking “, the Federal Labora-  
17                           tory Consortium for Technology Transfer,”  
18                           in subsection (c)(3);

19                           (ii) by striking “and the Federal Lab-  
20                           oratory Consortium for Technology Trans-  
21                           fer” in subsection (d)(2);

22                           (iii) by striking “, and refer such re-  
23                           quests” and all that follows through “avail-  
24                           able to the Service” in subsection (d)(3);  
25                           and

1 (iv) by striking subsection (e); and  
2 (E) in section 17—

3 (i) by striking “Subject to paragraph  
4 (2), separate” and inserting in lieu thereof  
5 “Separate” in subsection (c)(1):

6 (ii) by striking paragraph (2) of sub-  
7 section (c);

8 (iii) by redesignating paragraph (3) of  
9 subsection (c) as paragraph (2); and

10 (iv) by inserting “administrative”  
11 after “funds to carry out” in subsection  
12 (f).

13 **SEC. 207. REORGANIZATION OF THE BUREAU OF THE**  
14 **CENSUS.**

15 (a) IN GENERAL.—Effective as of the date specified  
16 in section 213(a)—

17 (1) the Bureau of the Census shall be trans-  
18 ferred to the Department of the Treasury; and

19 (2) all functions which, immediately before such  
20 date, are functions of the Secretary of Commerce  
21 under title 13, United States Code, shall be trans-  
22 ferred to the Secretary of the Treasury.

23 (b) INTERIM SERVICE.—The individual serving as the  
24 Director of the Census immediately before the reorganiza-  
25 tion under this section takes effect may continue serving



1 in that capacity until a successor has taken office. Com-  
2 pensation for any service under this subsection shall be  
3 at the rate at which such individual was compensated im-  
4 mediately before the effective date of the reorganization.

5 (c) SENSE OF THE CONGRESS.—It is the sense of the  
6 Congress that the Bureau of the Census should—

7 (1) make appropriate use of any authority af-  
8 forded to it by the Census Address List Improve-  
9 ment Act of 1994 (Public Law 103-430; 108 Stat.  
10 4393), and take measures to ensure the timely im-  
11 plementation of such Act; and

12 (2) streamline census questionnaires to promote  
13 savings in the collection and tabulation of data.

14 (d) AMENDMENTS.—Effective as of the date specified  
15 in section 213(a)—

16 (1) TRANSFER OF THE BUREAU TO THE DE-  
17 PARTMENT OF THE TREASURY.—(A) Section 2 of  
18 title 13, United States Code, is amended by striking  
19 “is continued as” through the period and inserting  
20 “is an agency within, and under the jurisdiction of,  
21 the Department of the Treasury.”.

22 (B) Subsection (e) of section 12 of the Act of  
23 February 14, 1903 (15 U.S.C. 1511(e)) is repealed.

24 (2) DEFINITION OF SECRETARY.—Title 13,  
25 United States Code, is amended in section 1(2) by

1 striking "Secretary of Commerce" and inserting  
2 "Secretary of the Treasury".

3 (3) REFERENCES IN TITLE 13, UNITED STATES  
4 CODE, TO THE DEPARTMENT OF COMMERCE.—Title  
5 13, United States Code, is amended in sections 4,  
6 9(a), 23(b), 24(e), 44, 103, 132, 211, 213(b)(2),  
7 221, 222, 223, 224, 225(a), and 241 by striking  
8 "Department of Commerce" each place it appears  
9 and inserting "Department of the Treasury".

10 (4) PROVISIONS RELATING TO THE SECRETARY  
11 OF THE TREASURY.—(A) Section 302 of title 13,  
12 United States Code, is amended by striking the last  
13 sentence thereof.

14 (B) Section 303 of title 13, United States Code,  
15 and the item relating to such section in the analysis  
16 for chapter 9 of such title are repealed.

17 (C) Section 304(a) of title 13, United States  
18 Code, is amended—

19 (i) by striking "Secretary of the Treasury"  
20 each place it appears and inserting "Secretary";  
21 and

22 (ii) by striking "Secretary of Commerce"  
23 and inserting "Secretary".

1 (D)(i) Section 401(a) of title 13, United States  
2 Code, is amended by striking "Secretary of Com-  
3 merce" and inserting "Secretary".

4 (ii) Section 8(e) of the Foreign Direct Invest-  
5 ment and International Financial Data Improve-  
6 ments Act of 1990 (22 U.S.C. 3144(e)) is amended  
7 by striking "Secretary of Commerce" and inserting  
8 "Secretary of the Treasury".

9 (iii) Section 401(a) of title 13, United States  
10 Code, is amended by striking "Department of Com-  
11 merce" and inserting "Federal Reserve System".

12 (5) COMPENSATION FOR THE POSITION OF DI-  
13 RECTOR OF THE CENSUS.—Section 5315 of title 5,  
14 United States Code, as amended by paragraph (7)  
15 of section 108(e), is further amended by inserting  
16 (in lieu of the item struck by such paragraph) the  
17 following new item:

18 "Director of the Census, Department of the  
19 Treasury."

20 (6) CONFIDENTIALITY.—Section 9 of title 13,  
21 United States Code, is amended by adding at the  
22 end the following:

23 "(c)(1) Nothing in subsection (a)(3) shall be consid-  
24 ered to permit the disclosure of any matter or information  
25 to an officer or employee of the Department of the Treas-

1 ury who is not referred to in subchapter II if, immediately  
2 before the date specified in section 213(a) of the Depart-  
3 ment of Commerce Dismantling Act, such disclosure (if  
4 then made by an officer or employee of the Department  
5 of Commerce) would have been impermissible under this  
6 section (as then in effect).

7 “(2) Paragraph (1) shall not apply with respect to  
8 any disclosure made to the Secretary.”.

9 (e) **RULE OF CONSTRUCTION.**—For purposes of title  
10 III, the reorganization of the Bureau of the Census under  
11 this section shall be treated as if it involved a transfer  
12 of functions from one office to another.

13 **SEC. 208. REORGANIZATION OF THE BUREAU OF ECO-**  
14 **NOMIC ANALYSIS.**

15 (a) **IN GENERAL.**—Effective as of the date specified  
16 in section 213(a)—

17 (1) the Bureau of Economic Analysis shall be  
18 transferred to the Federal Reserve System; and

19 (2) all functions which, immediately before such  
20 date, are functions of the Secretary of Commerce  
21 with respect to the Bureau of Economic Analysis  
22 shall be transferred to the Chairman of the Board  
23 of Governors of the Federal Reserve System.

24 (b) **INTERIM SERVICE.**—The individual serving as the  
25 Director of the Bureau of Economic Analysis immediately

1 before the reorganization under this section takes effect  
2 may continue serving in that capacity until a successor  
3 has taken office. Compensation for any service under this  
4 subsection shall be at the rate at which such individual  
5 was compensated immediately before the effective date of  
6 the reorganization.

7 (c) REPORTS.—Not later than 18 months after the  
8 date of the enactment of this Act, the Director of the Bu-  
9 reau of Economic Analysis shall submit to the Congress  
10 a written report on—

11 (1) the availability of any private sector re-  
12 sources that may be capable of performing any or all  
13 of the functions of the Bureau of Economic Analy-  
14 sis, and the feasibility of having any such functions  
15 so performed; and

16 (2) the feasibility of implementing a system  
17 under which fees may be assessed by the Bureau of  
18 Economic Analysis in order to defray the costs of  
19 any services performed by the Bureau of Economic  
20 Analysis, when such services are performed other  
21 than on behalf of the Federal Government or an  
22 agency or instrumentality thereof.

23 (d) RULE OF CONSTRUCTION.—For purposes of title  
24 III, the reorganization of the Bureau of Economic Analy-

1 sis under this section shall be treated as if it involved a  
2 transfer of functions from one office to another.

3 **SEC. 209. TERMINATED FUNCTIONS OF NTIA.**

4 The following provisions of law are repealed:

5 (1) Subpart A of part IV of title III of the  
6 Communications Act of 1934 (47 U.S.C. 390 et  
7 seq.), relating to assistance for public telecommuni-  
8 cations facilities.

9 (2) Subpart B of part IV of title III of the  
10 Communications Act of 1934 (47 U.S.C. 394 et  
11 seq.), relating to the Endowment for Children's  
12 Educational Television.

13 (3) Subpart C of part IV of title III of the  
14 Communications Act of 1934 (47 U.S.C. 395 et  
15 seq.), relating to Telecommunications Demonstration  
16 grants.

17 **SEC. 210. TRANSFER OF SPECTRUM MANAGEMENT FUNC-**  
18 **TIONS.**

19 There are transferred to the Chairman of the Federal  
20 Communications Commission all functions of the Sec-  
21 retary of Commerce, the Assistant Secretary of Commerce  
22 for Communications and Information, and the National  
23 Telecommunications and Information Administration  
24 under parts A and B of the National Telecommunication  
25 and Information Administration Organization Act.

1 SEC. 211. NATIONAL OCEANIC AND ATMOSPHERIC ADMIN-  
2 ISTRATION.

3 (a) TERMINATION OF AUTHORITY TO MAKE FISH-  
4 ERIES GRANTS.—No financial assistance may be provided  
5 under any of the following laws, except to the extent the  
6 provision of that assistance is a contractual obligation of  
7 the United States on the day before the effective date of  
8 this section:

9 (1) Section 2 of the Act of August 11, 1939  
10 (15 U.S.C. 713e-3), popularly known as the  
11 “Saltonstall-Kennedy Act”.

12 (2) Section 1 of the Act of September 2, 1960  
13 (16 U.S.C. 753a).

14 (3) The Antarctic Marine Living Resources  
15 Convention Act of 1984 (16 U.S.C. 2431 et seq.).

16 (4) The Anadromous Fish Conservation Act (16  
17 U.S.C. 757a et seq.).

18 (5) Provisions of the Magnuson Fishery Con-  
19 servation and Management Act (16 U.S.C. 1801 et  
20 seq.) and the Department of Commerce Appropria-  
21 tion Act of 1994 that authorize assistance to State  
22 fishery agencies to enhance their data collection and  
23 analysis systems to respond to coastwise fisheries  
24 management needs.

25 (6) The Interjurisdictional Fisheries Act of  
26 1986 (16 U.S.C. 4101 et seq.).

1           (7) Provisions of the Fish and Wildlife Act of  
2           1956 and the Department of Commerce Appropria-  
3           tion Act of 1994 that authorize assistance to State  
4           for a cooperative State and Federal partnership to  
5           provide a continuing source of fisheries statistics to  
6           support fisheries management in the States' terri-  
7           torial waters and the United States exclusive eco-  
8           nomic zone.

9           (8) Provisions of the Fish and Wildlife Act of  
10          1956 and the Department of Commerce Appropria-  
11          tion Act of 1994 that authorize assistance to States  
12          for a cooperative program which engages State and  
13          Federal agencies in the coordinated collection, man-  
14          agement, and dissemination of fishery-independent  
15          information on marine fisheries in support of State  
16          territorial waters and the United States exclusive  
17          economic zone fisheries management programs.

18          (9) Provisions of the Act of May 11, 1938 (16  
19          U.S.C. 756-757), popularly known as the Mitchell  
20          Act, and the Department of Commerce Appropria-  
21          tion Act of 1994 that authorize assistance to State  
22          fisheries agencies in the Pacific Northwest to protect  
23          and enhance salmon and steelhead resources in the  
24          region.



1 (10) Provisions of the Pacific Salmon Treaty  
2 Act of 1985 (16 U.S.C. 3631-3644) and the De-  
3 partment of Commerce Appropriation Act of 1994  
4 that authorize assistance to States in fulfilling re-  
5 sponsibilities under the Pacific Salmon Treaty by  
6 providing administrative, management, and applied  
7 research support to the States to meet the needs of  
8 the Pacific Salmon Commission and international  
9 commitments under the treaty.

10 (11) Provisions of the Marine Mammal Protec-  
11 tion Act of 1972 (16 U.S.C. 1371-1384) and the  
12 Department of Commerce Appropriation Act of 1994  
13 which authorize assistance to State agencies for the  
14 collection and analysis of information on marine  
15 mammals that occur in the State waters and inter-  
16 act with State managed fisheries.

17 (12) Provisions of the Pacific Salmon Treaty  
18 Act of 1985 (16 U.S.C. 3631-3644) and the De-  
19 partment of Commerce Appropriation Act of 1994  
20 that—

21 (A) authorize assistance to States to assist  
22 in fulfilling Federal responsibilities under the  
23 Pacific Salmon Treaty by restoring Southeast  
24 Alaska salmon harvests limited by the treaty

1 and by restoring salmon stocks as quickly as  
2 possible: and

3 (B) help implement a 1989 "Understand-  
4 ing between the United States and Canadian  
5 Sections of the Pacific Salmon Commission  
6 Concerning Joint Enhancement of  
7 Transboundary River Salmon Stocks".

8 (b) TERMINATION OF FISHERIES TRADE PROMOTION  
9 PROGRAM.—Section 211 of the Act of December 22, 1989  
10 (15 U.S.C. 1511b) is repealed.

11 (c) CONFORMING AMENDMENT TO TERMINATE FISH-  
12 ERIES PROMOTION AND DEVELOPMENT TRANSFERS AND  
13 FUNDS.—Section 2(b) of the Act of August 11, 1939 (15  
14 U.S.C. 713c-3), popularly known as the "Saltonstall-Ken-  
15 nedy Act", is repealed. Amounts remaining, on the effec-  
16 tive date of this section, in the funds established under  
17 that section that are not required for the provision of fi-  
18 nancial assistance that is not otherwise terminated by this  
19 section shall revert to the general fund of the Treasury.

20 (d) TERMINATION OF AUTHORITY TO GUARANTEE  
21 OBLIGATIONS FOR FISHING VESSEL AND FISHING FACIL-  
22 ITY CONSTRUCTION, ETC.—No new guarantee of an obli-  
23 gation or commitment to guarantee an obligation under  
24 title XI of the Merchant Marine Act, 1936 (46 App.  
25 U.S.C. 1271 et seq.) may be made under authority that

1 was vested in the Secretary of Commerce on the day be-  
2 fore the effective date of this section (relating to obliga-  
3 tions for fishing vessels or fishing facilities), except to the  
4 extent the making of such a guarantee was a contractual  
5 obligation of the United States on the day before that ef-  
6 fective date.

7 (e) TERMINATION OF COMPENSATION UNDER FISH-  
8 ERMEN'S PROTECTIVE ACT OF 1967.—No compensation  
9 may be paid under section 10 of the Fishermen's Protec-  
10 tive Act of 1967 (22 U.S.C. 1980), relating to compensa-  
11 tion for damage, loss, or destruction of fishing vessels or  
12 fishing gear, except to the extent the compensation was  
13 awarded before the effective date of this section.

14 (f) TERMINATION OF COMPENSATION TO FISHERMEN  
15 UNDER OUTER CONTINENTAL SHELF LANDS ACT  
16 AMENDMENTS OF 1978.—No compensation may be paid  
17 under title IV of the Outer Continental Shelf Lands Act  
18 Amendments of 1978 (43 U.S.C. 1841 et seq.), except to  
19 the extent the compensation was awarded before the effec-  
20 tive date of this section.

21 (g) TERMINATION OF MISCELLANEOUS RESEARCH  
22 FUNCTIONS.—The following functions, as vested in per-  
23 sonnel of the National Oceanic and Atmospheric Adminis-  
24 tration on the day before the effective date of this section,  
25 are terminated:

1           (1) All observation and prediction functions re-  
2 relating to pollution research.

3           (2) All functions relating to estuarine and  
4 coastal assessment research.

5 (h) TERMINATION OF NOAA CORPS.—

6           (1) TERMINATION.—The National Oceanic and  
7 Atmospheric Administration Corps is terminated,  
8 and the assets thereof shall be transferred to the  
9 Commerce Programs Resolution Agency.

10          (2) DISPOSITION OF ASSETS.—The Adminis-  
11 trator of the Commerce Programs Resolution Agen-  
12 cy shall attempt to sell the assets of the National  
13 Oceanic and Atmospheric Administration Corps,  
14 within 18 months after the effective date specified in  
15 section 213(a), to a private sector entity intending  
16 to perform substantially the same functions as were  
17 performed by the National Oceanic and Atmospheric  
18 Administration Corps immediately before such effec-  
19 tive date.

20          (3) REPORT.—If no offer to purchase assets  
21 under paragraph (2) is received within the 18-month  
22 period described in such paragraph, the Commerce  
23 Programs Resolution Agency shall submit a report  
24 to the Congress containing recommendations on the  
25 appropriate disposition of the assets and functions of

1 the National Oceanic and Atmospheric Administra-  
2 tion Corps.

3 (i) DISPOSAL OF NOAA FLEET.—The Secretary of  
4 the Interior—

5 (1) shall cease modernization of the National  
6 Oceanic and Atmospheric Administration fleet of  
7 vessels and terminate all new construction for that  
8 fleet;

9 (2) shall promptly dispose of all assets compris-  
10 ing the National Oceanic and Atmospheric Adminis-  
11 tration fleet; and

12 (3) may not purchase any vessels for the Na-  
13 tional Oceanic and Atmospheric Administration.

14 (j) OFFICE OF OCEANIC AND ATMOSPHERIC RE-  
15 SEARCH.—(1) Except as otherwise provided in paragraph  
16 (2) or (3), the Office of Oceanic and Atmospheric Re-  
17 search shall be terminated.

18 (2) Functions relating to weather research of the Of-  
19 fice of Oceanic and Atmospheric Research shall be trans-  
20 ferred to the National Weather Service.

21 (3)(A) The laboratories of the Office of Oceanic and  
22 Atmospheric Research shall be transferred to the Com-  
23 merce Programs Resolution Agency.

24 (B) The Commerce Programs Resolution Agency  
25 shall attempt to sell the property of the laboratories of

1 the Office of Oceanic and Atmospheric Research, within  
2 18 months after the effective date specified in section  
3 213(a), to a private sector entity intending to perform  
4 substantially the same functions as were performed by the  
5 laboratories of the Office of Oceanic and Atmospheric Re-  
6 search immediately before such effective date.

7 (C) If no offer to purchase property under subpara-  
8 graph (B) is received within the 18-month period de-  
9 scribed in such subparagraph, the Commerce Programs  
10 Resolution Agency shall transfer the remaining labora-  
11 tories to the Department of the Interior, which shall sub-  
12 mit a report to the Congress containing recommendations  
13 on the appropriate disposition of the property and func-  
14 tions of such laboratories:

15 (k) NAUTICAL AND AERONAUTICAL CHARTING.—(1)  
16 The nautical and aeronautical charting functions of the  
17 National Oceanic and Atmospheric Administration shall  
18 be transferred to the Defense Mapping Agency.

19 (2) The Defense Mapping Agency shall terminate any  
20 functions transferred to it under paragraph (1) that are  
21 performed by the private sector.

22 (l) NESDIS.—(1)(A) The National Environmental  
23 Satellite, Data, and Information System Data Centers  
24 shall be transferred to the Commerce Programs Resolu-  
25 tion Agency.

1 (B) The Commerce Programs Resolution Agency  
2 shall attempt to sell the property of the National Environ-  
3 mental Satellite, Data, and Information System Data Cen-  
4 ters, within 18 months after the effective date specified  
5 in section 213(a), to a private sector entity intending to  
6 perform substantially the same functions as were per-  
7 formed by the National Environmental Satellite, Data,  
8 and Information System Data Centers immediately before  
9 such effective date.

10 (C) If no offer to purchase property under subpara-  
11 graph (B) is received within the 18-month period de-  
12 scribed in such subparagraph, the Commerce Programs  
13 Resolution Agency shall submit a report to the Congress  
14 containing recommendations on the appropriate disposi-  
15 tion of the property and functions of the National Envi-  
16 ronmental Satellite, Data, and Information System Data  
17 Centers.

18 (2) Functions related to weather satellites of the Na-  
19 tional Environmental Satellite, Data, and Information  
20 System shall be transferred to the National Weather Serv-  
21 ice.

22 (m) NATIONAL WEATHER SERVICE.—(1) The Na-  
23 tional Weather Service is hereby transferred to the De-  
24 partment of the Interior.

1       (2)(A) The National Weather Service shall terminate  
2 its specialized agricultural, Marine Radiofax, and forestry  
3 weather services, and its Regional Climate Centers.

4       (B) The National Weather Service may terminate any  
5 other specialized weather services not required by law to  
6 be performed.

7       (n) NATIONAL MARINE FISHERIES SERVICE.—

8           (1) TRANSFER OF ENFORCEMENT FUNC-  
9 TIONS.—There are transferred to the Secretary of  
10 Transportation all functions relating to law enforce-  
11 ment that on the day before the effective date of this  
12 section were authorized to be performed by the Na-  
13 tional Marine Fisheries Service.

14           (2) TRANSFER OF SCIENCE FUNCTIONS.—  
15 There are transferred to the Director of the United  
16 States Fish and Wildlife Service all functions relat-  
17 ing to science that on the day before the effective  
18 date of this section were authorized to be performed  
19 by the National Marine Fisheries Service.

20           (3) TRANSFER OF SEAFOOD INSPECTION FUNC-  
21 TIONS.—There are transferred to the Secretary of  
22 Agriculture all functions relating to seafood inspec-  
23 tion that on the day before the effective date of this  
24 section were authorized to be performed by the Na-  
25 tional Marine Fisheries Service.



1 (o) NATIONAL OCEAN SERVICE.—

2 (1) TRANSFER OF GEODESY FUNCTIONS.—

3 There are transferred to the Director of the United  
4 States Geological Survey all functions relating to ge-  
5 odesy that on the day before the effective date of  
6 this section were authorized to be performed by the  
7 National Ocean Service.

8 (2) TRANSFER OF MARINE AND ESTUARINE  
9 SANCTUARY FUNCTIONS.—There are transferred to

10 the Secretary of the Interior all functions relating to  
11 marine and estuarine sanctuaries that on the day  
12 before the effective date of this section were author-  
13 ized to be performed by the National Ocean Service.

14 (p) ENVIRONMENTAL RESEARCH LABORATORIES.—

15 (1) TRANSFER.—The environmental research  
16 laboratories of the National Oceanic and Atmos-  
17 pheric Administration (other than laboratories of the  
18 Office of Oceanic and Atmospheric Research, re-  
19 ferred to in subsection (j)) shall be transferred to  
20 the Commerce Programs Resolution Agency.

21 (2) DISPOSAL.—The Commerce Programs Res-  
22 olution Agency shall attempt to sell the property of  
23 the laboratories transferred under paragraph (1),  
24 within 18 months after the effective date specified in  
25 section 213(a), to a private sector entity intending

1 to perform substantially the same functions as were  
2 performed by the laboratories before such effective  
3 date.

4 (3) REPORT.—If no offer to purchase property  
5 under paragraph (2) is received within the 18-month  
6 period described in such paragraph, the Commerce  
7 Programs Resolution Agency shall submit a report  
8 to the Congress containing recommendations on the  
9 appropriate disposition of the property and functions  
10 of the laboratories transferred under paragraph (1).

11 **SEC. 212. MISCELLANEOUS ABOLISHMENTS.**

12 The following agencies and programs of the Depart-  
13 ment of Commerce are abolished, and the functions of  
14 those agencies or programs are abolished except to the ex-  
15 tent otherwise provided in this Act:

16 (1) The Economic Development Administration.

17 (2) The Minority Business Development Admin-  
18 istration.

19 (3) The United States Travel and Tourism Ad-  
20 ministration.

21 (4) The National Telecommunications and In-  
22 formation Administration.

23 (5) The Advanced Technology Program under  
24 section 28 of the National Institute of Standards  
25 and Technology Act (15 U.S.C. 278n).

1           (6) The Manufacturing Extension Programs  
2           under sections 25 and 26 of the National Institute  
3           of Standards and Technology Act (15 U.S.C. 278k  
4           and 278l).

5 **SEC. 213. EFFECTIVE DATE.**

6           (a) IN GENERAL.—Except as provided in subsection  
7           (b), this title shall take effect on the effective date speci-  
8           fied in section 109(a).

9           (b) PROVISIONS EFFECTIVE ON DATE OF ENACT-  
10          MENT.—The following provisions of this title shall take ef-  
11          fect on the date of the enactment of this Act:

12           (1) Section 201.

13           (2) Section 206 (a)(2) and (d).

14           (3) Section 212.

15 **SEC. 214. SENSE OF CONGRESS REGARDING USER FEES.**

16          It is the sense of the Congress that the head of each  
17          agency that performs a function vested in the agency by  
18          this Act should, wherever feasible, explore and implement  
19          user fees for the provision of services in the performance  
20          of that function, to offset operating costs.

21           **TITLE III—MISCELLANEOUS**  
22           **PROVISIONS**

23 **SEC. 301. REFERENCES.**

24          Any reference in any other Federal law, Executive  
25          order, rule, regulation, or delegation of authority, or any

1 document of or pertaining to an office from which a func-  
2 tion is transferred by this Act—

3 (1) to the Secretary of Commerce or an officer  
4 of the Department of Commerce, is deemed to refer  
5 to the head of the department or office to which  
6 such function is transferred; or

7 (2) to the Department of Commerce or an  
8 agency in the Department of Commerce is deemed  
9 to refer to the department or office to which such  
10 function is transferred.

11 **SEC. 302. EXERCISE OF AUTHORITIES.**

12 Except as otherwise provided by law, a Federal offi-  
13 cial to whom a function is transferred by this Act may,  
14 for purposes of performing the function, exercise all au-  
15 thorities under any other provision of law that were avail-  
16 able with respect to the performance of that function to  
17 the official responsible for the performance of the function  
18 immediately before the effective date of the transfer of the  
19 function under this Act.

20 **SEC. 303. SAVINGS PROVISIONS.**

21 (a) **LEGAL DOCUMENTS.**—All orders, determinations,  
22 rules, regulations, permits, grants, loans, contracts, agree-  
23 ments, certificates, licenses, and privileges—

24 (1) that have been issued, made, granted, or al-  
25 lowed to become effective by the President, the Sec-

1       retary of Commerce, any officer or employee of any  
2       office transferred by this Act, or any other Govern-  
3       ment official, or by a court of competent jurisdic-  
4       tion, in the performance of any function that is  
5       transferred by this Act, and

6               (2) that are in effect on the effective date of  
7       such transfer (or become effective after such date  
8       pursuant to their terms as in effect on such effective  
9       date),

10 shall continue in effect according to their terms until  
11 modified, terminated, superseded, set aside, or revoked in  
12 accordance with law by the President, any other author-  
13 ized official, a court of competent jurisdiction, or operation  
14 of law.

15       (b) PROCEEDINGS.—This Act shall not affect any  
16 proceedings or any application for any benefits, service,  
17 license, permit, certificate, or financial assistance pending  
18 on the date of the enactment of this Act before an office  
19 transferred by this Act, but such proceedings and applica-  
20 tions shall be continued. Orders shall be issued in such  
21 proceedings, appeals shall be taken therefrom, and pay-  
22 ments shall be made pursuant to such orders, as if this  
23 Act had not been enacted, and orders issued in any such  
24 proceeding shall continue in effect until modified, termi-  
25 nated, superseded, or revoked by a duly authorized official.

1 by a court of competent jurisdiction, or by operation of  
2 law. Nothing in this subsection shall be considered to pro-  
3 hibit the discontinuance or modification of any such pro-  
4 ceeding under the same terms and conditions and to the  
5 same extent that such proceeding could have been discon-  
6 tinued or modified if this Act had not been enacted.

7 (c) SUITS.—This Act shall not affect suits com-  
8 menced before the date of the enactment of this Act, and  
9 in all such suits, proceeding shall be had, appeals taken,  
10 and judgments rendered in the same manner and with the  
11 same effect as if this Act had not been enacted.

12 (d) NONABATEMENT OF ACTIONS.—No suit, action,  
13 or other proceeding commenced by or against the Depart-  
14 ment of Commerce or the Secretary of Commerce, or by  
15 or against any individual in the official capacity of such  
16 individual as an officer or employee of an office trans-  
17 ferred by this Act, shall abate by reason of the enactment  
18 of this Act.

19 (e) CONTINUANCE OF SUITS.—If any officer of the  
20 Department of Commerce or the Commerce Programs  
21 Resolution Agency in the official capacity of such officer  
22 is party to a suit with respect to a function of the officer,  
23 and under this Act such function is transferred to any  
24 other officer or office, then such suit shall be continued

1 with the other officer or the head of such other office, as  
2 applicable, substituted or added as a party.

3 **SEC. 304. TRANSFER OF ASSETS.**

4 Except as otherwise provided in this Act, so much  
5 of the personnel, property, records, and unexpended bal-  
6 ances of appropriations, allocations, and other funds em-  
7 ployed, used, held, available, or to be made available in  
8 connection with a function transferred to an official or  
9 agency by this Act shall be available to the official or the  
10 head of that agency, respectively, at such time or times  
11 as the Director of the Office of Management and Budget  
12 directs for use in connection with the functions trans-  
13 ferred.

14 **SEC. 305. DELEGATION AND ASSIGNMENT.**

15 Except as otherwise expressly prohibited by law or  
16 otherwise provided in this Act, an official to whom func-  
17 tions are transferred under this Act (including the head  
18 of any office to which functions are transferred under this  
19 Act) may delegate any of the functions so transferred to  
20 such officers and employees of the office of the official as  
21 the official may designate, and may authorize successive  
22 redelegations of such functions as may be necessary or ap-  
23 propriate. No delegation of functions under this section  
24 or under any other provision of this Act shall relieve the

1 official to whom a function is transferred under this Act  
2 of responsibility for the administration of the function.

3 **SEC. 306. AUTHORITY OF ADMINISTRATOR WITH RESPECT**  
4 **TO FUNCTIONS TRANSFERRED.**

5 (a) DETERMINATIONS.—If necessary, the Adminis-  
6 trator shall make any determination of the functions that  
7 are transferred under this Act.

8 (b) INCIDENTAL TRANSFERS.—The Administrator,  
9 at such time or times as the Administrator shall provide,  
10 may make such determinations as may be necessary with  
11 regard to the functions transferred by this Act, and to  
12 make such additional incidental dispositions of personnel,  
13 assets, liabilities, grants, contracts, property, records, and  
14 unexpended balances of appropriations, authorizations, al-  
15 locations, and other funds held, used, arising from, avail-  
16 able to, or to be made available in connection with such  
17 functions, as may be necessary to carry out the provisions  
18 of this Act. The Administrator shall provide for the termi-  
19 nation of the affairs of all entities terminated by this Act  
20 and for such further measures and dispositions as may  
21 be necessary to effectuate the purposes of this Act.

22 **SEC. 307. PROPOSED CHANGES IN LAW.**

23 Not later than one year after the date of the enact-  
24 ment of this Act, the Director of the Office of Manage-  
25 ment and Budget shall submit to the Congress a descrip-



1 tion of any changes in Federal law necessary to reflect  
2 abolishments, transfers, terminations, and disposals under  
3 this Act.

4 **SEC. 308. CERTAIN VESTING OF FUNCTIONS CONSIDERED**  
5 **TRANSFERS.**

6 For purposes of this Act, the vesting of a function  
7 in a department or office pursuant to reestablishment of  
8 an office shall be considered to be the transfer of the  
9 function.

10 **SEC. 309. DEFINITIONS.**

11 For purposes of this Act, the following definitions  
12 apply:

13 (1) **ADMINISTRATOR.**—The term “Adminis-  
14 trator” means the Administrator of the Commerce  
15 Programs Resolution Agency.

16 (2) **AGENCY.**—The term “Agency” means the  
17 Commerce Programs Resolution Agency.

18 (3) **FUNCTION.**—The term “function” includes  
19 any duty, obligation, power, authority, responsibility,  
20 right, privilege, activity, or program.

21 (4) **OFFICE.**—The term “office” includes any  
22 office, administration, agency, bureau, institute,  
23 council, unit, organizational entity, or component  
24 thereof.

1           (5) WIND-UP PERIOD.—The term “wind-up pe-  
2        riod” means the period beginning on the effective  
3        date specified in section 109(a) and ending on the  
4        termination date specified in section 106(d).

5   **SEC. 310. LIMITATION ON ANNUAL EXPENDITURES FOR**  
6                           **CONTINUED FUNCTIONS.**

7        The amount expended by the United States each fis-  
8        cal year for performance of a function which immediately  
9        before the effective date of this section was authorized to  
10       be performed by an agency, officer, or employee of the De-  
11       partment of Commerce may not exceed 75 percent of the  
12       total amount expended by the United States for perform-  
13       ance of that function during fiscal year 1994.

○

Mr. MOORHEAD. We have several very distinguished witnesses with us this morning, and I look forward to their testimony on these important bills.

I now turn to the ranking minority member of this subcommittee, Representative Pat Schroeder, for her opening statement.

Mrs. SCHROEDER. Thank you very much, Mr. Chairman, and I really want to thank you for calling this series of hearings on this legislation that reorganizes the Patent and Trademark Office. I joined you in introducing this bill, and we are both going to introduce also the administration bill. We have found a way to be firmly on both sides, I guess. The concept is one that we really believe in, and the details we have to figure out as we go along, so that is what this is all about.

First, we saw this very week why this is so very important to move on. We had a full committee meeting where we discovered one more time the user fees generated by the Patent and Trademark Office are just an irresistible cash cow. I will stipulate this has been a bipartisan problem. When you see this kind of gold flowing, everybody wants to latch on to the stream. But the Senate has really gone beyond and is trying to divert the stream, almost.

I doubt there is a lockbox strong enough to keep peoples' fingers out of this. This is one of the reasons we think this could be a real model for a Government Corporation. Furthermore, because this office is so important, to impose a tax on innovation, which is going to happen if you start pulling these funds out for general revenues, will be intolerable. This country needs all the innovation it can get and we don't need to be taxing it.

There are many ways in which the flexibility of a Government Corporation structure can allow it to be efficient and effective. We want to try to accelerate innovation and be competitive in the global marketplace.

There is an area of critical concern that I have. I spent a long time on the Post Office and Civil Service Committee and I have always felt we have done a very poor job of taking care of the people that make these things work, the day-to-day employees, because if you don't have high morale and you don't have people who run the organization, it makes no difference what this organization is going to look like. We can't invent anything that is going to be better than the people who run it. So the lack of provisions in the administration bill dealing with employees and what their status is going to be concerns me a lot.

If we extend the protections to the PTO employees that are the fundamental equivalent of those they now enjoy by title V and other statutory provision, I think we are getting closer to where they are. But we will have to talk about this, I think, because this is a group of employees which has become terribly specialized. Their specialty is desperately needed to make this organization function, and yet if we are going to treat them like cogs in a wheel, that is probably not going to work. I am going to be listening carefully to proposals for changes we could put in to ensure employees have the level of protection they deserve.

Pay is one example. Right now, PTO employees are not allowed to bargain collectively because they are covered by the general schedule. If you take them off the general schedule, are you going

to allow them to bargain collectively or what mechanism are you going to use to set pay, and how are people going to feel that is fair? There are any number of things that I could walk through that are now in place and everybody understands. If you remove them where are you I think employees will feel they are in free-fall.

I ask unanimous consent to put my statement in the record and thank you for calling this hearing and moving this issue which is so critical.

[The prepared statement of Mrs. Schroeder follows:]

PREPARED STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF COLORADO

I want to thank you, Mr. Chairman, for scheduling this series of hearings on legislation that reorganizes the Patent and Trademark Office (PTO) as a government corporation.

I joined you in introducing H.R. 1659, and plan to join you in introducing the Administration's bill on this topic when it is ready, for several reasons. First, as our full committee proceedings earlier this week forcefully reminded us, the user fees that are paid by PTO's customers are increasingly irresistible as a "cash cow" that can all too conveniently be tapped for general revenue purposes. As I noted in full committee, the blame for this practice is bipartisan. However, what we have seen recently from the other body is a kind of escalation of this practice makes it clear that the PTO will be seriously impaired if we don't take action to end this practice entirely. I don't think there is a lock box strong enough to keep sticky fingers out otherwise. It is a tax on innovation, and it is unfair to PTO customers who pay these user fees in the expectation that they will be used to deliver services as quickly and efficiently as possible.

I also support this subcommittee's consideration of corporatizing the PTO because there are a number of ways in which the flexibility of a government corporation structure will allow the PTO to operate more effectively and efficiently. For example, exempting the PTO from the Workforce Restructuring Act, with its personnel ceilings, makes sense for an entity that is entirely funded by user fees.

Having said that, I want to focus on a critical area of concern, and that is the importance of having provisions in any legislation we ultimately approve that extend protections to PTO employees that are functionally equivalent to those they now enjoy by virtue of Title 5 and other statutory provisions. I believe this can be done consistent with the purposes that motivate us to seek government corporation status for the PTO, but I am not assured that the proposals before us at this point do so. So I will be looking carefully at all these proposals to see what changes we need to make to ensure that employees have the level of protection that they deserve. The issue of pay, for example, concerns me greatly. Currently, PTO employees do not have the right to collective bargaining with respect to pay, because they are covered by the General Schedule pay rates. If we take away that coverage, what mechanism are we affording to the employees to ensure that their pay is fair?

I look forward to today's testimony, and to the opportunity to discuss these concerns with our witnesses.

Mr. MOORHEAD. Thank you. I agree with a lot of things you have said. This is not necessarily a final package.

What we are all trying to do, we care about the Patent and Trademark Office. We want to make it work, and I am as irritated by the raids on the Office for money as you are. That is probably why we have this bill before us.

Mrs. SCHROEDER. Keep their mitts off the money.

Mr. MOORHEAD. We made a promise when we raised the fees that users paid that the money would be used to update that Office and to speed up the granting of patents and the procedures of the Office and automating. Everybody can't resist getting their hands on that money, it doesn't matter which party it is. So something has to be done.

We will be very much interested in some good, sound advice as to how we can make the bill better. It is not going to pass overnight. I am very, very much interested in the comments of our first witness, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, the Honorable Bruce Lehman. He served as counsel to this subcommittee for 9 years, and as chief counsel for a number of those years. He has been a key player on intellectual property issues in the United States and abroad. He has headed numerous delegations to consider international intellectual property issues at the World Intellectual Property Organization. He is here today representing the administration. Welcome, Commissioner Lehman.

**STATEMENT OF BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE**

Mr. LEHMAN. Thank you very much, Mr. Chairman, and I really want to thank you again for your leadership in—as a steward of our Nation’s intellectual property system. This hearing is a perfect example of that, to take time out of a busy Congress to focus on this issue.

I really appreciate the opportunity to be here to present the views of the administration on proposals to grant the Patent and Trademark Office the flexibility needed to create a responsive and businesslike organization of the type that is included in H.R. 1659, your proposal.

I just would like to make a comment following up on what Mrs. Schroeder said. She referred to the Patent and Trademark Office as a gold mine. It really is a gold mine, but the gold mine isn’t the fee revenue that it generates. The gold mine is the commercialized innovation that it makes possible in our economy, that produces millions of jobs and great economic opportunities and international economic competitiveness for the United States. That is where the gold mine is.

The legislation that you have introduced and the administration’s proposals are really designed to make that mine work more efficiently and better so that it stimulates the economy even more than it does at the present time.

I would like to say that, you know, we can’t pick up the morning newspaper and not read about all the conflicts in Washington and the disagreements that we have on a bipartisan basis. I think sometimes that is very much overplayed, and this is a perfect example of where actually great minds are thinking alike. It is very clear that the time has come to revisit the structure of the Patent and Trademark Office and the similarities between your program and the administration proposal are probably greater than the differences. I have no doubt that we will be able to come to an accommodation and provide the users of the system and the citizens of this country with a better system in the near future.

Vice President Gore has taken a personal interest, I wanted to make clear, in this matter as a part of the administration’s overall “Reinventing Government” project and has been very much involved in it. There is a press release at the press table from the

Vice President, because the administration testimony and the bill that we will submit to you represent our views on how to make the Government in general more accountable and more competitive and we want to be able to use private-sector models wherever possible.

I want to apologize for the lateness in getting our testimony up here, but part of the reason was that this is considered to be very important in the administration at the highest level, not simply because of the Patent and Trademark Office. It is obviously important for the intellectual property system, but it is important for government in general because we see this very much as a template, as a model for what we might do with other Federal agencies, as well, to make them work better. So I think that we probably have more agreements than we have disagreements, and those agreements are shared I think at the highest level in the Congress and in the administration.

Perhaps I can outline a couple of the concepts that underlie the administration's approach to this legislation. They are, first, that we should recognize that the administration, the Government, has a policy role, but it also then has a role oftentimes to deliver services to people. And we think sometimes that the policy advice and the service delivery functions should be separate where the traditional controls that a Presidential administration has on policy questions really don't relate to the delivery of a service. But it is also very important to recognize that we not throw out that very important policy function in our attempt to deliver better services.

Another concept that is guiding us in the administration is that we believe that agencies that deliver services should be permitted to hire chief executive officers with management experience to be in charge of the delivery of service functions. And we think that those nonpartisan professionals who are hired to perform those service delivery functions should have set before them clear and measurable goals so that their progress can be measured, their productivity can be measured, and they can be held accountable and also be rewarded for meeting the goals.

In exchange for that increased accountability for performance and for customer service, organizations like the reorganized Patent and Trademark Office naturally then should be able to receive considerable flexibility from the traditional government system in human resource management, budget, procurement and other administrative functions. In effect, what we are suggesting is that organizations should be judged less by the Federal personnel manual and the GSA manual, et cetera, and more by what the customers think about the services that the organizations are delivering, just like the private sector.

We think that this approach is right in theory and practice, and the bill that we are going to be submitting to you embodies these basic principles and will transform the examining functions of the Patent and Trademark Office into the first performance-based organization in the entire Federal Government, and we hope to use this as a template for other matters as well.

The proposal for a wholly owned government corporation that is established under H.R. 1659, as well as the proposal being prepared by the administration, give the Patent and Trademark Office the flexibility that we feel it needs to adapt resources as demand

for its services increases. An essential element is that the fees paid by the users of the services and purchasers of the products, including foreign users and purchasers, would continue to fund the organization, and no taxpayer money would be required.

Our bill, and your bill as well, Mr. Chairman, establish a performance-based, customer-oriented organization. In our bill, that organization will be called the U.S. Intellectual Property Organization, and it will be responsible for the examination of all patent and trademark applications and for other services regarding the grant of patents and the registration of trademarks such as making patent and trademark data publicly available, et cetera.

One of the differences between our bill and the bill that you have introduced is that we have an Under Secretary of Commerce in our bill who would be appointed by the President with the advice and consent of the Senate and who would issue policy guidance to this organization on the conduct of a patent and trademark examination; and this Under Secretary would sign the letters patent and trademark registration certificates, and would advise the Secretary of Commerce and the administration, the U.S. Trade Representative and other departments and agencies on intellectual property issues, including international issues. We think that this separation of the responsibilities of the Under Secretary and the organization that actually administers patent and trademark examination services are an important part of our bill, and we think it is very important that that policy function still have accountability to the highest levels of government.

The actual patent and trademark examining organization would be run by a chief executive officer, a CEO, who would be appointed by the Secretary of Commerce and would serve on the basis of a 6-year contract with the Secretary. Now, the Secretary of Commerce would evaluate the performance of the CEO based on an annual performance agreement that would be negotiated between the two parties, including factors such as the productivity of the organization, and then the Secretary of Commerce would be able to reward efficient and effective performance with a bonus.

Flexibility in work force management would be provided under our administration proposal through exemptions from many of the existing laws that govern personnel matters for Federal employees; there is a similar provision in H.R. 1659, and I would be more than happy to discuss with Mrs. Schroeder her concerns regarding that.

Like your bill, Mr. Chairman, our administration bill would provide flexibility in procuring services, equipment and property by exempting the Patent and Trademark Office from a number of the laws that govern procurement by taxpayer-funded Federal departments and agencies. These are the key features really in our administration bill. I might point out some of the differences between H.R. 1659 and the administration bill and try to note some of the reasons for those differences, and we can have an ongoing dialogue about them.

First, your bill, Mr. Chairman, as you know, would create a Patent and Trademark Office unassociated with any government department or other agency, and it would have a Commissioner appointed by the President, with advice and consent of the Senate, and the Commissioner would report directly to the President. This

contrasts with the administration bill where we still give a considerable role to the Secretary of Commerce and Under Secretary of Commerce for Intellectual Property.

The reason for that is though it may sound at first blush to be a nice idea to have a Commissioner of this organization that reports directly to the President, as a practical matter, we believe that it is very unlikely, as set up under H.R. 1659, that the head of the Patent and Trademark Office would have much access to the administration, not nearly the kind of access to a President that you get when you have a seat at the Cabinet table, as we have now with the Secretary of Commerce. We are in a dialog with the Congress on this issue, but we feel very strongly that American business, by and large—and that is certainly true of intellectual property businesses—needs that seat at the Cabinet table.

I have the title of Assistant Secretary of Commerce, and there have been many, many times, had we not had that very high-level access, in which the interests of the intellectual property system would not have been properly taken care of.

There is a certain irony to this. There was a time in which the Commissioner of Patents and Trademarks was not an Assistant Secretary of Commerce. We found during that period of time that even though the title was great and the Commissioner was appointed by the President along with three other officials of the Patent and Trademark Office, that you just didn't have that kind of access and representation.

A very important part of my job right now is to be the advocate—not just to run the Patent and Trademark Office as its CEO, but to be the advocate for the intellectual property system. A fabulous agreement that we negotiated in the Uruguay Round, the TRIPS Agreement, which is going to return billions of dollars of lost revenue to this country by ending piracy around the world on both the patent and trademark and copyright sides was really developed and negotiated right in our office as a part of that Assistant Secretary of Commerce function that the Commissioner has.

Mr. BONO. May I ask, how are you ending piracy?

Mr. LEHMAN. Mr. Bono, we are never going to end piracy any more than we are going to end, I suppose, shoplifting in supermarkets or drug stores.

Mr. BONO. I thought I heard you say you are going to end piracy.

Mr. LEHMAN. Perhaps I misspoke; we are bringing piracy that is occurring on an international basis very, very much under control, and the first step in that regard was to persuade many of our trading partners around the world—in many cases where they had no intellectual property laws that truly protected intellectual property—to pass such laws as patent, trademark and copyright laws. That is one of the major benefits of the TRIPS Agreement. There are major countries around the world that did not have effective protection for intellectual property in their legal systems, and now they will.

We have an ongoing effort with our Office in conjunction with the USTR to work on a bilateral basis and we have discussions going on with at least 18 countries around the world to monitor their implementation of the TRIPS Agreement and to use all resources



available to us to make certain they implement that agreement and that they do crack down on piracy.

A very good example of that was the bilateral agreement that we entered into with China earlier this year which has already resulted in the shutting down of some of the pirating CD factories and so on. That is a very good example of the progress that we have made.

Now, I think, as I said, you have to analogize this to shoplifting. K-Mart hasn't figured out how to bring shoplifting down to zero, but they certainly have developed techniques to keep it very much under control and that is very much what we are working to try to do.

[The prepared statement of Mr. Lehman follows:]

PREPARED STATEMENT OF BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and Members of the Subcommittee, Thank you for this opportunity to provide the views of the administration on proposals to grant the Patent and Trademark Office the flexibility needed to create a responsive, business-like organization, including the proposal in H.R. 1659.

The Administration believes it is important to transform all agencies that have a clear mission, clear measures of performance, and are self-supported through their own revenues into business-like, performance-based, customer-oriented organizations that have the flexibility inherent in a wholly-owned Government corporation. The Patent and Trademark Office is just such an organization.

As Congress and the President work toward creating a balanced budget, there will be differences of opinion regarding what Government should do, but there is common ground on how Government should work. Both Democrats and Republicans want all Government organizations to be performance based and customer oriented.

Two years ago, Vice President Gore presented President Clinton with a blueprint to create a Government that works better and costs less. Last week, he presented a progress report on the implementation of those recommendations. In that report, he also presented new recommendations and said:

We must have a Government that is accountable—not just every four years at the voting booth, but everyday. But if we are going to hold agencies and individuals accountable for accomplishing certain things, we must also ensure they have the kind of flexible authority they need in order to do what needs to be done. They can't succeed with one (or both) hands behind their back.

Vice President Gore recommends agencies measure their results, be more accountable, be competitive, and privatize wherever possible. His concept of performance-based organizations has several components, which have been incorporated into the legislation to be sent to this Committee shortly. These are:

Separate policy advice from service delivery functions.

Hire a chief executive officer with management experience to be in charge of the service delivery functions. The CEO would hire through a competitive search, for a fixed term, with a clear contract for services to be delivered. Half of his or her pay will be based on performance. The CEO would have to meet the targets set in his or her annual performance agreement to be eligible for all or some of the bonus.

Set clear, measurable goals and measures of progress and productivity.

In exchange for increased accountability for performance and customer service, the organization would receive flexibility in human resource management, budget, procurement, and other administrative functions.

The concept of transforming agencies into performance-based organizations, as is proposed in the legislation we will present shortly, is not some new, untried concept. The British Patent Office undertook a similar transformation five years ago and cut its costs by 40 percent and increased its productivity by 3 percent per year.

This approach is right in theory and right in practice. Innovators across the globe have taken it and successfully put it into place using an agency-by-agency approach. The bill we will describe today does just that. It will transform the patent and trademark examining functions of the Patent and Trademark Office into the first

Performance-Based Organization in the Federal Government. The Administration will propose similar organizations elsewhere in the Government in the next few months, but it is especially important to start with the Patent and Trademark Office because transforming it quickly is important to America's global economic position.

Let me explain why it makes sense to begin transforming the Federal Government by starting with the Patent and Trademark Office. First, it is not funded with taxpayer money. Our operations are paid for by those who use our services and buy our information products. Our workload consists primarily of patent and trademark applications filed by individuals and businesses in the United States and from other countries. These applicants, both domestic and foreign, pay fees for the services they request. They expect and deserve the prompt and efficient service they pay for.

If all remains as it is, however, as the number of patent and trademark applications filed increases, the ability of the Office to process them promptly and efficiently could decrease. Existing laws and regulations governing Federal employment and procurement inhibit the Office from hiring additional employees to meet the ever increasing demand for its services and from acquiring needed equipment and additional space quickly and at the lowest cost.

The laws and regulations to which I refer serve important purposes in our democratic system by keeping government expenditures of taxpayer revenues down and by ensuring that personnel and procurement practices of taxpayer funded Federal departments and agencies are both uniform and transparent. These same laws and regulations, however, impede our efforts to respond to the needs of our paying customers. These laws and regulations make it difficult for the Patent and Trademark Office to simply increase our workforce to keep pace with our workload, provide the competitive salaries needed to retain experienced employees in high-demand fields, constantly upgrade employees' equipment to improve efficiency, and increase the space available for housing both employees and equipment—actions that a private corporation would take when faced with increasing demands for its services.

As a wholly-owned net Government corporation established under H.R. 1659 or the proposal being prepared by the Administration, the Patent and Trademark Office would have the flexibility it needs to adapt its resources as demand for its services increases. The fees paid by users of the services and purchasers of the products, including foreign users and purchasers, would continue to fund the organization. No taxpayer moneys would be required.

This flexibility provided by the bill would not, however, eliminate oversight of the organization's activities by the Congress, the President, and the Secretary. This Organization and all wholly-owned government corporations are subject to the provisions of the Government Corporation Control Act (31 U.S.C. §9101 *et seq.*). They must report annually to the Congress on their activities. The Inspector General responsible for the organization also would submit reports to the Congress in accordance with the Inspector General Act.

Let me itemize the key features of the Administration's draft bill which will be forwarded to the Congress shortly. The bill would establish a performance-based, customer-oriented organization under the direction of the Secretary of Commerce, responsible for the examination of all patent and trademark applications and for other services regarding the grant of patents and the registration of trademarks. The Secretary of Commerce, through the Under Secretary, would retain responsibility for the sovereign responsibility of granting patents and registering trademarks. The organization, called in the bill the United States Intellectual Property Organization (hereafter, the Organization), would be a unique agency of the Department of Commerce and would report to the Secretary of Commerce. The Organization generally would not be subject to departmental administrative restrictions, but receive policy guidance on patent and trademark matters from a newly established Under Secretary of Commerce for Intellectual Property. In addition to its responsibilities, in connection with patent and trademark examination, the Organization would be responsible for disseminating patent and trademark information to the public and for performing other duties necessary for the administration of the Organization or assigned by the Congress.

The Under Secretary of Commerce for Intellectual Property, who would be appointed by the President with the advice and consent of the Senate, would issue policy guidance to the Organization on the conduct of patent and trademark examination, sign letters patent and trademark registration certificates, and would advise the Secretary and, subject to the authority of the Secretary, the Secretary of State, the United States Trade Representative, and other department and agency heads, on intellectual property issues, including international issues. This separation of responsibilities between the Under Secretary and the Organization will ensure that patent and trademark functions are performed efficiently and cost effectively and

that intellectual property is taken into account in deliberations at the highest levels of Government.

The Chief Executive Officer (CEO) of the Organization would be appointed by the Secretary of Commerce and would serve on the basis of a six-year contract with the Secretary. The Secretary would evaluate the performance of the CEO, based upon an annual performance agreement negotiated between the two, including factors such as productivity of the Organization, cycle times, efficiency, cost reduction, and innovative ways of delivering patent and trademark services. The Secretary would be able to reward efficient, effective performance with a bonus of up to the annual rate of basic pay of Executive Level 1, the same amount which is the maximum for the CEO's basic annual salary. If the Secretary found the CEO's performance unsatisfactory, the Secretary would be able to relieve him from duty. This incentive-based employment system should prove a powerful motivator for efficient, high quality, cost-effective service to the users of the Organization's services.

Flexibility in work force management would be provided by the bill through exemptions from many of the existing laws governing personnel matters for Federal employees. A similar provision is contained in H.R. 1659. These exemptions are itemized in an amendment to section 3 of title 35 of the United States Code. These itemized exceptions would permit the CEO to determine the number of employees to hire and the terms and conditions of their employment, including supplemental employee benefits, rates of pay, performance-based compensation, etc., without the limitations imposed on taxpayer-funded departments and agencies by many of the provisions of title 5 of the United States Code. The Administration bill also will contain a provision exempting the Organization from the full-time equivalent (FTE) ceiling contained in the Federal Workforce Restructuring Act and linking FTE levels to workload and productivity. Instead, the organization would be subject to a ceiling that could be adjusted annually by a percentage equivalent to the projected change in patent and trademark application filings projected for that year based upon a linear regression model spanning ten years and taking into account productivity changes. This would allow the workforce to change, but in a rational fashion. Let me emphasize that this feature is one of the most important flexibilities we seek, and is critical to the future viability of the American patent and trademark systems.

This workforce flexibility is necessary if the Organization is to hire needed employees quickly as the demand for patent and trademark services increases. Flexibility is also needed if the Organization is to reduce the high turnover of examiners that the Patent and Trademark Office routinely experiences, particularly in rapidly growing fields like biotechnology and computer and software-related technology. By being able to pay salaries competitive with those offered by the private sector, the Organization might cease being a mere stepping stone to high-paying jobs in the private sector.

This salary flexibility would not be unlimited. An overall salary cap is set for employees. The CEO could not offer salaries above a rate equivalent to the annual rate of basic pay for SES Level 6 and total compensation, including basic pay, overtime and bonuses, but not benefits and retirement, could not exceed the annual rate of basic pay for Executive Level I.

The Administration's bill, like H.R. 1659, contains provisions designed to smooth the transition to the corporate organization. Employees of the Patent and Trademark Office who become officers or employees of the Organization would not face a reduction in salary or job loss as a result of the change for at least one year after that change occurs. Any leave employees had accumulated before the change would be maintained. In addition, existing employment and compensation systems would remain in place until modified, superseded, or set aside by the Organization or a court, or by operation of law. Retirement and health benefits could not be reduced, but could be augmented by the Organization. Any changes made in retirement, life, or health benefits, however, cannot result in benefits that are less favorable than those in effect at the time the Organization is created.

Collective bargaining agreements in effect the day before the shift to the Organization would remain in effect, as would recognition of the bargaining units, until changed by the parties. Building on the Administration's support for labor-management partnerships throughout the Executive Branch, the bill establishes a joint committee made up of an equal number of members appointed by the CEO and designated by the labor organization to assist the CEO by making recommendations regarding the design and implementation of any position classification system, any system to determine qualifications and procedures for employment, any compensation and awards system, and any augmentations the Organization might make to retirement and benefits programs. These provisions are all aimed at smoothing the transition from the existing organization to the new corporate environment.

Like H.R. 1659, the Administration's bill would provide flexibility in procuring services, equipment, and property by exempting the Patent and Trademark Office from a number of laws that govern procurement by taxpayer-funded Federal departments and agencies. For example, the Federal Property and Administrative Services Act of 1949 imposes detailed requirements, and sometimes substantial administrative costs, that inhibit the ability of the Patent and Trademark Office to provide prompt, efficient service to patent and trademark applicants. Under an amendment to section 2 of title 35 of the United States Code, the Organization would be able to minimize the cost of acquisition for new equipment while still assuring a competitive procurement process.

To ensure objectivity, the Secretary of Commerce would be responsible, under the Administration's bill, for appointing members to the two Boards that review decisions of examiners—the Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences. In addition, the Secretary would set all fees that are charged by the Organization. Fees would be set to recoup the expenses of the Organization and fees for patents could not be used for trademark operations nor could fees paid by trademark applicants be used to cover expenses related to patents. Financial relief, in the form of a 50-percent reduction for major patent fees would continue for individual inventors, small business concerns and non-profit organizations. One other key feature in the administration's bill is a provision that would end the Patent Surcharge Fund on the date that is currently provided for—October 1, 1998.

These are the key features that will be found in the administration's bill. Now let me point out some of differences between the administration's proposal and H.R. 1659 and note the reasons why we have chosen to draft our bill as we have.

H.R. 1659 would create a Patent and Trademark Office unassociated with any Government department with a Commissioner, appointed by the President with the advice and consent of the Senate. The Commissioner would report directly to the President. This contrasts sharply with the oversight authority the administration bill gives the Secretary of Commerce and the policy advisory authority given the Under Secretary of Commerce for Intellectual Property. We believe that intellectual property issues should have a strong advocate in all deliberations of the Government on issues that might affect intellectual property. We also believe that consideration of intellectual property policy issues should take place in a forum where other views and considerations can be brought to bear. Neither of these would be assured if the head of the organization responsible for patent and trademark functions were not part of the Cabinet structure of the Government. As the department responsible for encouraging the development of technology and for promoting exports of U.S. produced goods and services, the Department of Commerce is the logical place for oversight authority related to the Organization responsible for patent and trademark functions of the Government.

H.R. 1659 provides for a Management Advisory Board of 18 members. The President, the Speaker of the House of Representatives, and the President pro tempore of the Senate would each appoint 6 members of the Board, no more than of whom could be from the same political party. The Board members would serve for terms of six years. The Chair of the Board would be appointed by the President and would serve for 3 years. The bill specifies that the members of the Board are to represent the interests of diverse users of the Patent and Trademark Office and they are to include individuals who have backgrounds and achievements in corporate finance and management. The Board would have its own staff and would be provided access to records and information except for personnel and privileged information, including information in patent applications. Its function would be to review policies, goals, performance, budget, and fees of the Office and advise the Commissioner on these matters and prepare an annual report for the President and the House and Senate Judiciary Committees. The report would also be published in the Official Gazette.

The administration does not believe that an advisory board is necessary to provide appropriate oversight for the operation of a wholly-owned Government corporation that administers the patent and trademark laws. As I mentioned in connection with the Administration's bill, the Organization would be subject to review by the inspector general who would be responsible for preparing a report to Congress under the requirements of the Government Corporation Control Act. Finally, under the Administration's bill, the Secretary of Commerce would also oversee the operation of the Organization and would evaluate the CEO's performance based upon the performance agreement reached between the Secretary and the CEO annually. Under those circumstances, we believe an advisory board would add costs without improving performance.

Under H.R. 1659, the current system, under which Congress established the fees for the patent-related services and products and authorized adjustments by the

Commissioner based on the Consumer Price Index, would remain in place. We believe that this is impractical. It hobbles the organization's ability to plan for the future by making future income dependent not on anticipated costs based on accurate projections of future patent and trademark filings but on the fees originally set in the law and the changes in the Consumer Price Index since 1992. The Administration's bill will direct that fees be set to recover costs directly related to the provision of services and products. Those considerations, and the oversight authorities to which I've referred before, should be sufficient to ensure against any excessive fees.

As you are aware, Mr. Chairman, the Congress has failed to appropriate approximately \$60 million in Patent Surcharge revenues over the past four fiscal years. While H.R. 1659 would require that the Patent and Trademark office Surcharge Fund be eliminated on the effective date of the act and that all residual and unappropriated balances in the Fund be transferred to the Patent and Trademark Office at the same time, it does not provide a pay-go offset as required by the Budget Enforcement Act. The Administration's bill, consistent with the President's budgets assumes elimination of the patent Surcharge Fund and discretionary appropriations beginning in fiscal year 1999 when OBRA expires.

There are other differences between H.R. 1659 and the Administration's draft bill, but I will not address them here. The Administration is continuing to review H.R. 1659 and will provide additional written views. We understand that the Department of Justice has serious Constitutional and other concerns with H.R. 1659. The Administration believes that the time has come to convert the Patent and Trademark Office into a wholly-owned Government corporation responsible for the examination of patent and trademark applications and related services and for distributing information products concerning patents and trademarks. Only by establishing such a corporation can we ensure that, in the face of an ever increasing workload, the users of our services and purchasers of our products, who fully fund the operations of the Office, will continue to receive the prompt, efficient service they expect and deserve.

Mr. MOORHEAD. Thank you. We appreciate your coming and we will have a round of questions now. I will start out.

On page 7 of your testimony you indicate that the new PTO Corporation would not be subject to Department of Commerce regulations and restrictions, but would only receive policy guidance. What does that really mean?

Mr. LEHMAN. What it means is that for all the purposes of our procurement, our budget, our personnel system, the Patent and Trademark Office would function as a Government Corporation and would basically be able to set up its own systems and would not have to consult with anybody in the Commerce Department. However, when it comes to policies, it would be very much under the control of the Secretary of Commerce. Let me give you an indication of what some of those policies might be and maybe you will understand the distinction better.

We have very important differences of opinion regarding intellectual property issues. We have a lot of agreements among us, I think. For example, I think we all agree that we should have a more efficient, more downsized government on both sides of the aisle, the administration and Congress; but we have legitimate disagreements, and that is why we have more than one party and why we have elections.

Some of the differences are very sensitive. For example, we had a press conference by a group of religious organizations and environmental type organizations about 3 months ago indicating that we should not issue patents on life forms. There has been an issue in the past, for example, should we issue patents on the products of human fetal tissue research. Those are very sensitive policy questions. President Clinton may have one view on those, I may have another, but if President Clinton is replaced by a President of the other party, that President is entitled to have his views re-

flected, the views reflected by the electorate, in the intellectual property system.

It is one thing to have a very efficient examination system so that examiners have the best system of performance and pay and are provided incentives to do a great search of the prior art, and that they have all the computer systems necessary to do their job. It is quite another matter simply to turn over to a non-policy-oriented bureaucrat the right to make these very, very sensitive policy decisions. That is why we would maintain a strong Cabinet-level role and that Cabinet-level role obviously will reflect whoever happens to be sitting in the White House. And we know over a period of time that that will change and that will reflect the will at that given moment of the American people, as it ought to do.

Mr. MOORHEAD. Why does a Government Corporation need authority to revise patent and trademark fees beyond the authority to make annual adjustments for inflation in accordance with changes in the Consumer Price Index? All the governments that we have had have been grabbing money out of this fund anyway, and if we allow them to keep their money, are they going to need to increase their fees, other than the cost-of-living increases?

Mr. LEHMAN. Under the present legislation, we don't have to increase fees to keep up with the CPI. In fact, the first year that I was Commissioner, we did not do so. We actually forewent one of our fee increases, and we probably would have been able to do so last year as well had not money from our fees been diverted.

So the current legislation, keep in mind, is only permissive. It does not mandate any increases in fees.

I think a very important principle behind trying to make this operation more efficient is that, to the extent that we can make it more efficient and provide higher quality services at less cost, the benefits of those efficiencies should be passed through to the users of the Patent and Trademark Office through lower fees.

One of the reasons, one of the other differences, I think, between our proposal and H.R. 1659 is that we would have the Secretary of Commerce setting the fees, and under your proposal, the Congress would continue to do so. And let me say I have the utmost respect for the Congress, and the Congress is the sovereign authority in this country and is ultimately, if it wishes, in a position where it should be able to set these fees. As a practical matter, however, it is difficult.

I don't need to tell you how hard it was to schedule this hearing this morning. It would be more difficult for Congress to get involved in some of the minutia of fee-setting at the Patent and Trademark Office, where you have hundreds of people wanting to be heard, wanting to testify about it. If we set up a procedure administratively where, under the oversight of Congress where the Under Secretary or the CEO of the Corporation can, you know, take time out of his schedule or her schedule to sit there and hear hundreds of people advise them on all of the fine points of the fee system and then have the flexibility administratively to set that fee system—of course, under the supervision of the Congress, which can always change what is done—I think we will just have a more efficient system that will work better.

Let me say a word about fees, because I think—as we have a discussion about this as we go forward, one of the problems of the current fee structure, I think, is that it doesn't necessarily reflect what we really do in the Patent and Trademark Office. It is kind of a broad-brush approach and we, in effect, have a cross-subsidization. Not every patent takes the same amount of time to grant. And we end up sometimes encouraging inefficient practices in the Patent and Trademark Office simply because of our fee structure.

We, for example, encourage patent examiners to get an applicant to divide up a patent application into multiple applications because each application carries with it another fee. Where you have a very complicated patent, say, a biotechnology patent that may take an enormous amount of time to examine, there is a great deal of artificial pressure to get the applicant to divide up that application simply so we can get the fees to properly examine the application. Those are the kinds of things I think we need to look into in a lot more detail, because they not only may be unfair to patent applicants in general, but may encourage inefficiency in the examination process. It is hard for Congress to get into that level of detail. It is much easier to do that administratively inside the Government, and then of course with congressional oversight, which can always review anything that is done.

Mr. MOORHEAD. One of the issues that does come up as you start changing the form in which the Office should operate is the relationship with the employees, and I think Pat somewhat touched on it. The legislation relaxes the civil service requirements for hiring and firing employees.

Is this important? What is to stop the Office from hiring incompetent people and firing employees arbitrarily? I know the unions are concerned about this. But the Patent and Trademark Office has no competition. If the Office is given flexibility to pay employees whatever salary it wants, what will prevent the Office from paying every employee the statutory maximum or being overgenerous with money?

This is an area we have to discuss. We have got to decide what stops and what goes. I would like your comments on that.

Mr. LEHMAN. First of all, I think you hit on a very important point which we can never lose sight of, and that is that under any proposal that we have right now and that I can imagine for the immediate future, that you can't use a completely private-sector model for the examination of patents and trademarks because you are not going to have competition. You are not going to have that fundamental discipline of the market place if there are two people out there providing the services.

That really gets back to the point about having some supervision. I see we will have congressional supervision, but also we need to have some supervision on behalf of the Presidency, on behalf of a Cabinet official, because in the substitute I think in government generally—and sometimes it is an imperfect substitute but it is the best thing we have been able to come up with so far—for agencies that don't really have marketplace pressure is the discipline of politics. Elected officials—the President is responsible for what goes on in his administration, and you are responsible for what goes on on the Hill. That is one of the reasons why we feel strongly about con-

tinuing this role within a Cabinet department, specifically the Department of Commerce.

With regard to the union questions and the employee questions, let me say that one of the differences between H.R. 1659 and the administration bill is that H.R. 1659 contains no provision for having an organized work force under the Federal Labor Relations Act, whereas the administration's bill specifically provides for that.

The administration bill in fact will provide the following:

It will provide for continuation of all of the existing contracts that we have with our three labor organizations. We have three unions at the Patent and Trademark Office today. We have two locals of the National Treasury Employees Union, one of them represents the trademark professionals, the attorneys, and the other represents all of the clerical employees. And then we have the Patent Office Professional Association, which represents the patent examiners.

All contracts, under our proposal, with those three organizations would be transferred to the new Intellectual Property Organization that we would set up. That would be the starting point.

Then we specifically provide—one of the things that I am fairly proud of, and it again is an initiative that the Vice President led in the administration generally, so we set up partnership councils all over the Federal Government, and I think we have one of the best ones in our operation, where we meet regularly, management and all of the labor organizations. We made a lot of progress in developing a more harmonious relationship there. We would institutionalize that by having in this organization a permanent management-labor council which would advise the chief executive officer on a wide range of policies.

There would be collective bargaining on impact and implementation for all personnel matters, including pay. Now, at the present time, we don't have bargaining in the Federal Government over pay, we don't have the Federal Government bargaining over the classification system.

Obviously, one of the things that we will be doing if this new corporatized entity goes into effect is that we will have—like any entity in the private or public sector, we will have to have a personnel manual. We won't have the straitjacket of the manual OPM develops right now; we will be able to develop one that is more tailored to our needs, that recognizes maybe we need a specific class of people—a Ph.D. biotech examiner for example, and if we have a crackerjack biotech examiner with a Ph.D., we don't necessarily have to stick him into a management position just to give him a raise, if he is doing a great job and we need to be able to give him a raise in order to keep him there and keep him doing a good job. We will set up our own personnel system in an orderly way in consultation with employees and there will be impact and implementation bargaining over all those decisions under our proposal.

So we think that that really does pretty much provide both for a more efficient system, but at the same time will give us—our employees the protections of the right to organize as they have now under the Federal Labor Relations Act, and then will give them the right to have considerable input in the decisions of management. The new partnership council will be one form of giving advice, and



impact and implementation bargaining will be the other control that we will have in the administration bill.

Mr. MOORHEAD. The gentledady from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I want to thank Commissioner Lehman for being here. As always, Commissioner, your testimony is very informative and to the point. I think I hear you saying that basically you have no problems with transferring protections people now have by virtue of title V if you are going to transfer the contracts, et cetera. Is that—

Mr. LEHMAN. Yes. I think there are aspects of title V that don't really fit us. The present G.S.—1 through —15 system and the SES system, that doesn't fit us very well. That is one of the changes that we want to make. We will presumably have a different system. Keep in mind, the purpose of this is to do better by our employees.

One of the big drags any organization has on it is if you can't do well by your employees and they are unhappy, the organization isn't going to work very well. A fundamental purpose of this corporatizing legislation is to permit us to do well by our employees so that we can provide them with the maximum incentives and the best possible environment to be efficient and to do a good job. That is the starting point. So we will take what we have now, which is obviously title V-based, we will develop a new personnel manual, we will develop that in consultation with this labor-management council that is provided for.

What we don't want to have happen is, to have a sort of classic situation where we spend 5 years—one side has to take an unreasonable position and the other side has to take an unreasonable position and we spend 5 years and we are in Federal court "dotting the i's and crossing the t's" on what our personnel manual is going to look like. That is kind of an old-time model of management-labor relations. You will find that in any competitive business, even in the automobile industry today, they have gotten away from that a lot. They are trying to have a more cooperative model, and that is what we want.

So we have a council that will work on it. Management then will have the flexibility to set up a system, a new personnel manual which will, I am quite confident, maintain most, if not all, of the protections that we now have, and probably a lot more advantages for employees under title V; and then we will have bargaining over impact and implementation. "Impact" means negative impact, so if there is a negative impact of anything in this new personnel manual, there will be the right to bargain on that.

Mrs. SCHROEDER. I think the real concern is, number one, to make sure this doesn't become something where there would be patronage violations; this should not become a patronage corporation where you can just move everybody out and move new people in. So having some kind of formal protection against that, written into the corporate structure so that these are professional people and merit people and not patronage people, becomes important.

I think there is a critical point about how you enforce these things. We would want the corporation to be able to remove people for cause, but no one has ever allowed the employer to totally de-

termine solely what is for cause in the Government. We have had different agencies that make sure that it doesn't become autocratic or something that is out of control.

The concern that everybody has is, what do you do on those two things, and how do you determine pay, because again the title V stuff or the pay survey stuff or things that people have looked at before don't really fit. These are all things, I think, we need to figure out because it seems to me that one of the things the Corporation should have is a floor that you can't fall through. You certainly wouldn't want a patronage trapdoor to open up, or you wouldn't want a retaliation trapdoor to open up.

That is my real concern, how do we craft that, because I think this is going to be a model for future government organizations.

Mr. LEHMAN. I think that obviously you start out with a statutory foundation for anything, and we have that in our bill. H.R. 1659 has no statutory foundation. The administration bill specifically does. Under the oversight, in our case, of the Secretary of Commerce and also the Congress, you develop a personnel manual which will be developed in the open, and you—in our case, we are proposing to have an impact implementation bargaining specifically on issues, like pay, like the classification system, what is going to be the impact on an employee, how will it be implemented.

I am glad you used that word "patronage," because it gives me an opportunity to make another point about the bill and about the difference between H.R. 1659 and the approach that we will be sending up.

First, let me say there is no patronage; I am not aware that under any administration of any party, probably within living memory of any person alive today, that there is patronage at the Patent and Trademark Office, with the sole exception of the very, very limited number of schedule C employees we have—I think, right now, two at the Patent and Trademark Office, my confidential assistant and another person in our Public Affairs Office, who are political appointees.

Mrs. SCHROEDER. That is how I think it should be. I really don't think you should politicize the Patent and Trademark Office.

Mr. LEHMAN. We haven't had patronage, don't have it, and are not going to have it.

But I do think it raises a point why it is important to have the Under Secretary of Commerce for Intellectual Property and to separate the management of the Corporation from that. Under the administration bill, the Secretary will conduct a competitive search for a CEO. This will be a strictly professional search, that will be a nonpartisan search, and then the CEO will be hired under a contract. We envision this person as being not a political-type person. This will be a professional manager, paid on the basis of performance.

Under H.R. 1659, the head of the Corporation will be appointed directly by the President and confirmed by the Senate. Now we think it is important to have Presidential involvement, but that should be for a policy person, not for the person that runs the company. So in a sense, when you get to this patronage point, I think our administration bill is designed, more than H.R. 1659, to insu-

late the organization from being used as patronage. Patronage has connotations.

I think we all agree that there is a role for political appointees in the Federal Government to serve that policy process. You don't want to have computer experts or biotech patent examiners hired on a political basis.

Mrs. SCHROEDER. Thank you very much.

Mr. HOKE [presiding]. I am going to recognize myself now for some questions. I would like to go back to the question of pricing models with respect to the fee schedules.

You clearly have an understanding that when you are using monopoly pricing models that it is very difficult to get any sense of what the real value of a particular product or service is because there is nothing to measure it against. One of the things that we were taught in a fundamental economics course in college is that the worth of a thing is the price it will bring, except in a monopoly when you have nothing to test it against.

You stated that the pricing mechanism will be affected by the discipline of politics. My question would be, what about the abuse of politics? What I don't understand is how you go about pricing the amount that each of these services is going to actually cost?

Mr. LEHMAN. Well, right now, the way the system works is that we total up how much money it costs us to operate and then the fees are basically established, although they are statutory fees, keep in mind. But when they were originally developed, they were pretty much developed on the basis of what it cost us to actually examine and issue the patents and the trademarks and do our job. So right now it is a system—it is as if you had a private company, say, Ford Motor Co., and Ford Motor Co. took how much does it cost us to put out the cars, and that is going to be our price.

In a sense that is how the private sector does do it. The difference is, in the private sector they have General Motors, Chrysler, Honda, or Toyota, so if they find that once they total up all the costs and their costs are more than the next guy's, they have to take pretty quick action to start reducing those costs; otherwise, they are not going to be in business much more. That is the thing that is missing in any kind of Government Corporation.

Mr. HOKE. I understand that. I think we all understand that. What I am suggesting to you is that the discipline of politics as being the thing that is going to attenuate price is not a satisfactory way to go about it. What I am asking you, and I guess I am asking you this now and I am asking you to go back to the drawing board, is to actually propose a more comprehensive method for determining pricing. Because as you say, this isn't just about the Patent and Trademark Office; this is about creating models for the rest of the Government, and I think—I don't see where you are coming from in terms of a realistic way to figure out what these things ought to cost and what we should be charging for them.

Right now we run a surplus in the Office; is that correct?

Mr. LEHMAN. Not really. I guess we have a surplus to the extent that we managed to get by with about \$20 billion of our revenue being diverted to other areas.

Mr. HOKE. In other words, we take in \$20 million more than we are spending on the Office, so that is a \$20 million profit or sur-

plus. We can argue about whether that should stay in the Department or not. I think that is a good argument, but I don't think we have gotten closer to a responsible, thoughtful pricing model for what these services should be—

Mr. LEHMAN. Mr. Hoke, I would say this. The bill that we have sent up, and certainly H.R. 1659, neither one of them really are what I would call "pricing" or "fee reform" bills; that is sort of a separate issue. But I agree it is a very important issue.

Mr. HOKE. It is important because if we don't get to that, then we can't get to what we ought to be paying people and what it should cost to run the Office.

Let me change the subject to the other side of this, the issue of the amount of money that will be paid to employees; and particularly, let's go to the executive level 1 CEO salary, not because I am particularly interested about this particular salary, but using this as a model for what is going to be used in other departments in the Government. My first question, is why do you need a salary mechanism that essentially can double the CEO—this is a civil servant, but we are calling it a CEO because it is in a new kind of a privatized organization; why is it we need to double the salary? Around \$125,000 is the top salary, is that about right?

Mr. LEHMAN. My salary is at \$118,000 and the top salary under executive level 1 now is \$149,000.

Mr. HOKE. Say \$150,000. We are saying that we would be able to double that to give an incentive for maximum performance, correct? That is what your legislation is.

Mr. LEHMAN. Yes.

Mr. HOKE. My first question is, what is the rationale behind that—not in terms of the incentive part; I understand that. But are you saying that we are not offering enough money at \$150,000 as a top salary to attract the best and the brightest? Is that the problem?

Mr. LEHMAN. That is exactly what we are saying. I think all of us who are Government officials, I took a substantial salary cut when I took this job in the Clinton administration and I would suspect some of you did so when you ran for Congress, and certainly could earn additional money doing other things. But, you know, there is an attraction to—even in this day and age when it is pretty tough to be a public servant, there is still an attraction to being in the policymaking process that causes people to have a big incentive to want a policy job in government, particularly in an administration where for appointed officials we have effective term limits. We have no expectation of serving longer than 4 years at any given point in time.

Mr. LEHMAN. We also know that we are not going to do this for our whole life and that we are going to have to go out and do something else later. And so, when you are talking about policy officials, talking about Under Secretary of Commerce, you are going to get some talented, bright people who are going to come and do that.

On the other hand, when you are talking about somebody just to come in and run an organization. I can tell you a specific example.

Our information system is a hundred million dollar a year operation. The man who was running that when I first came into the job, retired. And I had the idea in mind that there are all these

people in the private sector. You know, companies are downsizing. There must be some, like, midlevel executive at IBM or DEC or something like this who would be crackerjack to run our information system.

I said, I am going to conduct a nationwide search for a person. I am going to advertise in the Wall Street Journal, Los Angeles Times, New York Times, so on, Chicago Tribune, and we did, to find this person who was out of a job in the private sector and could come work for us.

And the interesting thing about it is, in that search, in the end we ended up hiring a person to be our CEO from elsewhere in the Government. And the reason for that is that we simply were not competitive. We could not attract—

Mr. HOKE. OK. I appreciate that.

Mr. LEHMAN [continuing]. Somebody from the private sector to take that function.

Mr. HOKE. So the bottom line is we are not offering enough money to attract the best people who are available?

Mr. LEHMAN. When you are talking about a strictly professional function and somebody can earn \$250,000 at IBM and the most they can earn is \$120,000—

Mr. HOKE. Well, then how does this in one specific person, in the CEO's place—I mean—I mean, it seems to me that you are taking a band-aid approach to a larger problem. The larger problem is one of compensation generally for very difficult and highly skilled positions. And you are saying that we are going to do it with this one CEO, where you can have a bonus up to 100 percent of the executive grade 1 pay.

Now, and let me—and let me also say that I think that when you draw a distinction between a, quote, policy person, and the person who is running the company—and that is what you were saying. I mean, that is a distinction that simply does not exist in the private sector. The policy person is the CEO. The policy person is the person who is running the company on a day-to-day basis, and that is the CEO.

And to suggest somehow that there is a distinction or there is a bright line that is drawn between this CEO and a person that is making policy as dictated by the Secretary of Commerce, should such a department even exist, or somehow through the President or the political process, and that there is some difference there, I think just, first of all, doesn't understand the private sector and doesn't understand how companies are run on a day-to-day basis or a private corporation like this runs on a day-to-day basis. Because you can't draw those distinctions.

Mr. LEHMAN. Well, I think private sector chief executives don't have the right to interpret the law and make it stick. I don't know of any private sector executive that has the right to say we shall, as a matter of policy, issue patents on the products of human fetal tissue research or we shall not do it. And that is the kind of policy authority that a—

Mr. HOKE. Well, then I would suggest—

Mr. LEHMAN [continuing]. Public official has that the private sector doesn't.

Mr. HOKE. I would suggest, Mr. Commissioner, you are probably putting in a title, chief executive officer, that is well beyond the intention of what you are saying. Because that title implies a great deal of responsibility that is not simply administrative. And what you are saying is that this position would strictly be an administrative position and not have policy—

Mr. LEHMAN. Policy of the type that I described. Clearly, there are other—the kind of policy authority that CEO's in the private sector have, this person would have.

We talked about the personnel system. Obviously, there are lots of kinds of personnel systems that you might have. The nature of the products, where you put resources, how you relate to your customers, what your strategy is going to be for making your customers happy with you, those are all policy questions. But they are not the kind of political policy questions that are unique to Government officials, that inherently get wrapped up in an organization like the Patent and Trademark Office. And we just need to recognize that, separate that function from the corporate policy type function. There is such a thing as corporate policy. It is different from government policy.

Mr. HOKE. Well, I want to—I want to let some other people ask questions. And since there is so few of us, if anybody wants to ask at any time.

Mr. BECERRA. Mr. Chairman.

Mr. HOKE. Yes, let me finish up with one—well, go ahead, please.

Mr. BECERRA. No, no, go ahead.

Mr. HOKE. Well, my thought is this, and that is that, you know, we—there have been so many attempts at reinventing government over a long period of time, and I think it would be irresponsible not to be skeptical of any of these attempts. And I am not talking about on a partisan basis. You know, whether the attempt comes from this administration or from this Congress, I think that it—I think that the law of unintended consequences is so pervasive and powerful, and it is so easy to make decisions and decide to do things in a way that we think is going to have these great impacts, when we just haven't thought them through maybe as thoroughly as we ought to.

And I have some genuine skepticism regarding this proposal. Not because I don't think we ought to downsize Government. We ought to make it more efficient, more effective. But I don't think that we have gotten at the basic issues here. And the basic issues are trying to come up with a way of—with a pricing model inside of a monopoly that is realistic and genuine and coming to task also and coming to terms with the problem of attracting the kind of people that we need in an agency such as this when we have got the restrictions that exist with respect to pay grades. And we ought to talk about those things openly and not think that we are going to solve this problem by creating a new private—

Mr. LEHMAN. Well, Mr. Hoke, if I could just suggest, this is a—these legislative proposals are a first step toward being able to get to the kind of better solution that you are talking about.

And if I can just say a word about the fee structure, because there is a difference between the two bills. I personally think that our fee structure at the Patent and Trademark Office needs a lot

of work. But that is not the sort of thing that we can have 3 days of public hearings with six witnesses and get to the bottom of it. It is the sort of thing, if you set up this system that we are talking about and then let these professionals get in there and, really get into the meat of the things.

I mean, they can hire some consultants, they can have public hearings and have hundreds of people come and testify. We are even now on the Internet. People can talk to us electronically. Really get the information, really get some input and lots of models, then I think you will see people will be able to come back with really educated responses to the questions that you are asking.

And these bills are first steps toward putting us in that position and having a more perfect society.

Mr. HOKE. Well, I like first steps, but I always get nervous when I see—there is a big difference between a first step and legislation that is actually in written form where we are getting ready to mark something up.

Mr. Becerra.

Mr. BECERRA. Thank you very much, Mr. Chairman.

Mr. Lehman, first of all, thank you for being here; it is us a pleasure to have you testify before us. I would like to focus the time that I have on the whole issue of labor-management relations. It is a concern to some of us.

Can you give me an idea, mostly speaking in terms of the administration's proposal, not so much the bill that is before us today, but the administration's proposal, about what you foresee to be the adverse effects upon the Corporation were current employees at the PTO to have the same rights to collective bargaining that they currently have or might have in a traditional private sector setting?

Mr. LEHMAN. Well, first, with regard to the rights to collective bargaining that employees currently have, the administration's bill is labor neutral in that it basically transfers the existing system into the new Corporation with, actually, some additional benefits. Part of that existing system is our partnership council idea and so on, so forth. Actually, that would be made part of the statute in this legislation.

When one looks at private sector, I think this would be very a controversial matter. You know, our employees right now are covered under the Federal Labor Relations Act. And there is also a separate National Labor Relations Act that covers employees in the private sector, and it works entirely differently. And that is what people at General Motors and Ford and other places have, and one could say we would be covered under that act. And if you wanted us to go that route, that is what you would do.

My discussions with our labor organizations indicate that that is not what they want. As is always the case when you are trying to make change, it is the tension that occurs between the devil that you know and what you don't know. And to some degree, that also goes to Mr. Hoke's questions about the fee system.

One thing we know, if we stay static in human affairs, we will never make progress. We will never go anywhere.

You try to be prudent when you are making change, I think. We have tried, with regard to labor relations, to build on the existing system. Undoubtedly there will be an evolution in this particular

enterprise. I very sincerely hope that it will be one that will be a model that will do better by the employees and have improved Federal labor relations. And that is where we are—that was the basis of the administration's approach.

Mr. BECERRA. So are you saying that in any transition, were we to adopt the administration's proposal, that the rights of employees to collectively bargain within the PTO would remain the same or be enhanced? Or would they be diminished?

Mr. LEHMAN. Well, technically, they are the same. In many ways, they would be enhanced because there will be an opportunity now to discuss with employees matters that are now settled matters where they can't get a benefit.

You know, we just talked about an issue here—about pay. And Mr. Hoke expressed some concern that we shouldn't have a CEO that would be paid more than a government official, for example. Well, when I talked about my problem with the CIO person, information officer, I could have said the same thing about patent examiners in the biotech area or people in the complicated computer arts.

I think one of the things we need to have is the flexibility to give some people raises to get them out of that straitjacket G.S.—1 through —15 system. So I think there are going to be benefits for the employees, but we are going to give the employees collectively a right to have some input into that and control because we are going to have impact and implementation bargaining on any decision that is made to change the personnel structure.

Mr. BECERRA. OK. So I think what you just focused on at the end of your statement there is the fact that you would be requiring that there be some type of employee management committee?

Mr. LEHMAN. That is correct.

Mr. BECERRA. So you would require that, which is not something that is currently required?

Mr. LEHMAN. That is right. It is not in the law now.

Mr. BECERRA. And as I understand it, your proposal also would provide some exemptions to title V of the U.S. Code.

Mr. LEHMAN. Well, the Patent and Trademark Office is not going to be governed under title V—or the intellectual property organization—any more. It will have its own personnel manual, which will be developed with input from this joint labor-management council. And then any final decisions that are made on that manual will be subject to impact and implementation bargaining.

Mr. BECERRA. And, see, that is where I have a concern. Because this joint council, which is mandated, in essence mandates that both sides sit down. And if the union should find that it is not something that is beneficial, they have no choice and they are, in essence, having to sit down to perhaps bargain away certain rights.

Mr. LEHMAN. Well, I don't think that they are going to have the right to bargain over impact and implementation.

The other model would be that we would have, the National Labor Relations Board model, that is used in much of the private sector. And it would require a new election. Our bill just transfers the existing unions into the intellectual property organization.

Employees would have to decide who they wish to represent them in that context. And the employees would have the right to



strike, and they would be able to say, unless you pay us what we want and do exactly what we want, we would be able to strike and we think we have come up with the appropriate model here for a Federal agency, even though it is a Federal agency with considerable more flexibility to do better by its employees.

Mr. HOKE. Mr. Becerra, would you yield?

Mr. BECERRA. Sure.

Mr. HOKE. Thank you. Because I am fascinated and somewhat confused by what I am hearing here.

What you are saying is that, in your legislation, you mandate management employee groups, and this is legislation that the Vice President has a personal interest in. And yet at the NLRB there have been recent, recent—you know, 2 years ago now—rulings that make it very clear that such management-labor type committees are illegal and may not be entered into. Which is why there is a bill called the Team Act which, as you know, labor is very much opposed to. It is a bill that will be coming up later this year.

Mr. BECERRA. Well, the committees aren't illegal per se. They are illegal unless they are formed in the cases of employment settings where there is a collective bargaining agreement in place.

Mr. HOKE. Where there is already one in place. But, presumably, you are talking about—but this is with government—I mean, these are government employees who are members of government employee unions.

Mr. BECERRA. So requiring this type of joint committee is what concerns me, because I am not certain to what degree employees who already have an agreement or have an employment relationship with the PTO are going to be a part of the discussions and ultimate decisions on anything that would translate into this joint committee. Both in terms of what they can do—

Mr. LEHMAN. Well, the committee consists of the union, I mean, representatives of the union. So, presumably, the employees voted for the union officers, and they voted to also certify that particular union. So I think the assumption is that through that mechanism the employees are having their input.

Mr. BECERRA. And is it the case—are you saying that the employee unions are in agreement with the administration's proposal that we should have a joint committee?

Mr. LEHMAN. I think you would have to talk to the employee unions about what their position is. I think there may be some different positions among the different unions.

Mr. BECERRA. Thank you.

Let me ask a couple other questions. Is there anything in your legislation, your proposed legislation, that would provide for some form of review of allegations of management abuse? For example, if an employee claims that there was a denial of employment within a certain job classification or promotion or particular pay issue, is there some type of review? Is it an independent review? What type of review would be permitted?

Mr. LEHMAN. The legislation doesn't get into that level of detail. Just like the fee savings situation, we could sit here in this committee and we could write a new personnel manual for the Patent and Trademark Office. I think it would probably be a pretty imper-

fect one. So the idea here is that a new personnel manual will be written for—

Mr. BECERRA. By whom?

Mr. LEHMAN. For this organization.

Mr. BECERRA. Who will write the personnel manual?

Mr. LEHMAN. That will be written by the management in consultation with the employees under this council arrangement.

By the way, the existing contracts will automatically apply. So then the new system will—people will start sort of where they are now. The new system will be developed in consultation. Management will write the manual, and then if there is anything in there that the employees don't like about it that will be subject to implementation and impact bargaining.

That seems to us to be a pretty reasonable model as to how to proceed. Would you suggest another model?

Mr. BECERRA. Well, I don't know if I understand this model that you are talking about. Is it consultation or is it some form of active decisionmaking where there is, in some cases, an equal vote to perhaps even veto something taking—

Mr. LEHMAN. We are trying to make the Corporation more efficient. Title V right now does not permit Federal employee unions to bargain, for example, for pay right now. It doesn't permit them to bargain over the classification system.

Mr. BECERRA. But what if we should have an instance where the new Corporation says the pay scales for comparable positions that we have now categorized as G, whatever, should be less?

Mr. LEHMAN. Well, I think that would be subject to impact. That has an impact. Wouldn't it be a negative impact? So I think it would be subject to impact and implementation bargaining.

Mr. BECERRA. So that means that—

Mr. LEHMAN. That means that if the union were able to assert that there was a negative impact on the employees in carrying this out, then they would be able to raise that in bargaining. And if we had a disagreement, then they would be able to litigate that, as they now can. I think the alternative model—

And frankly, I will just be very candid about this, and I am sure that you will hear from some of our unions about an alternative model. And this administration is very committed to a fair shake for Federal employee unions. I want to make that absolutely crystal clear.

The alternative model is to have an old-time, old-fashioned, let's slog it out over every little point, every little detail of the—from the start, and give unions virtually a veto power over every single decision about, literally, the drafting of the personnel manual, as opposed to the impact.

Now there will be consultation. Now the difficulty with that is that that will—we are trying to make something that works more efficiently, that works better, as opposed to spending, you know, 5 years in Federal court or 10 years or 15 years litigating this and having the organization under a cloud for a long period of time.

Mr. BECERRA. I am not trying to pass judgment on whether your proposal or implementation is best or not. I am just concerned because, ultimately, PTO, which has proven to be successful and is a money-making operation—that is one of the reasons why there

is consideration of making it private—is, in essence, nothing more than the employees that make it up. So the Corporation would not be successful if the employees, the workers there, did not make it successful from the very top, the Commissioner, down. All I am saying—

Mr. LEHMAN. You are 100 percent correct. That is the whole thrust of this, to make people happy there.

Mr. BECERRA. So as we become private, let's remember that what has made this organization successful and will make it, we hope, continue to be successful as a private corporation or a semiprivate corporation will be the people from the Commissioner on down. And I would hope that in the transition we don't forget that. We want to bring everything that has made us successful.

Let me ask one last question with regard to contracting out. The issue of contracting out is one where we always want, as we have been discussing, to go towards the most efficient, the most cost-effective way of doing business. In the process of contracting out, would you be supportive of language, whether in your proposal or any other proposal, that would say that we would make sure that in the use of non-Corporation employees to perform work of the Corporation that that contracting out would occur only where such services would be the most practical, practicable, efficient and cost-effective?

Mr. LEHMAN. Would I be—

Mr. BECERRA. Would you accept the language that says something to the effect that it has to be—in the process of contracting out, you have to reach the decision that it is the most practicable, efficient and cost-effective?

Mr. LEHMAN. Well, let me say that that is certainly our view. That would be my view.

By the way, one of the reasons why—

Mr. BECERRA. That would be your view, to include that within—

Mr. LEHMAN. No, that should be the criteria for contracting out. I mean, I think that is almost common sense. I will have to consult with my colleagues in the administration as to whether or not we think it would be advisable to put that in the statutory language.

Mr. BECERRA. But let me ask you when you—

Mr. LEHMAN. This again gets to the point, we are trying to create an organization that has some management flexibility so that managers can run the organization, the employees can do their job. And if one starts to get the Congress into, you know, the decisionmaking process of, you know, processing the T's and dotting the I's of how the organization works, then you run counter to—that general philosophy.

And so I have to say that my personal reaction would be that I would prefer not to see that put in the legislation. But I would give you my pledge that that is the way I view it and that is the intention of how this will work.

Mr. BECERRA. Let me ask—

Mr. LEHMAN. Can I say a word about contracting out?

Mr. HOKE. Mr. Becerra, we have to get to Mr. Bono.

Mr. BECERRA. If I could ask one last question, conclude with this question.

I know you to be an imminently logical man. If in fact you wish to head in the direction with regard to any contracting out that we go there because it is more effective, it saves us money, it is more efficient, why wouldn't you just want to say that?

Mr. LEHMAN. You know, Mr. Becerra, it is not for me to get involved in the committee's business. And if you wish to offer that amendment and your colleagues agree with it, I think that is—

Mr. BECERRA. I would like you to be supportive.

Mr. LEHMAN. What I am concerned about is the slippery slope of trying to write a labor-management contract in this legislation. And if we get on that slippery slope, I think we are going to have a little bit of a problem.

And my last appearance before the subcommittee was on another piece of legislation, and one of the things I expressed concern about is that some of the private parties involved wanted to write a contract in the Federal copyright law. And it just is not a very efficient way of doing things.

Mr. BECERRA. I would submit to you that saying that we should be as efficient and cost-effective as we can be has nothing to do with labor-management relations. If we can be more efficient and cost-effective by contracting out, so be it. But if we won't be more efficient, then we shouldn't contract out.

That, to me, doesn't mean you are going into the labor-management relationship. What you are saying is let's just be as productive as we can be, whether we are public or whether we are private.

Thank you, Mr. Chairman, for being so gracious with the time.

Mr. HOKE. Thank you.

I want to go to Mr. Bono, but I want to take just 90 seconds because I think this—I really believe that, for the record, it is important to make the observation that when this administration in its responsibility as the shareholder, if you will, of the PTO and in thinking about how it will go about reinventing not just the PTO but obviously using, per your testimony, the PTO as a model for all of government, what this administration says is that, as a matter of proposed legislation, it believes strongly that labor-management committees should be a part of an ongoing enterprise. And I think it is particularly schizophrenic that this same administration through the DOL 2 years ago made a very, very different kind of judgment.

And all I can say is I think I am very encouraged that when it has the responsibility itself of trying to work out models about what will work best for the American people, for the taxpayer and for models of efficiency in terms of getting services delivered in efficient ways, that the Government in this particular administration, with the personal interest of Vice President Gore, opts for labor-management committees.

And at this time I would like to recognize Mr. Bono.

Mrs. SCHROEDER. Mr. Chairman, can I just interfere for one second? I have got a defense conference going on that I have got to go to. I really apologize. Could we ask for permission to submit questions for the record of this and the further panels? Because I really apologize.

Mr. BONO. Did you want to ask more questions?

Mrs. SCHROEDER. No. No. I will submit questions to the record and to the panels, too. And I hope I get back, but you know, defense, when they lock us up with the Senate, you never know.

Mr. BONO. If you had any additional questions, you want to ask?

Mrs. SCHROEDER. Thank you.

Mr. HOKE. Mr. Bono.

Mr. BONO. Thank you, thank you for appearing. I would like to go a little broader than some of the questions that have been asked, although they are important and they are unsolved.

I agree with you on some of the points that you make, for instance, the CEO, to compete with the private sector, I even think you are still short when you get that high-powered. But let me ask you this. How—how many gross dollars annually do you think you would represent with a private Corporation like this?

Mr. LEHMAN. Well, right now, we are a revenue-based organization. And the members may not be fully aware of this, but, for example, if our revenues decline or we have some shortfall in revenue—for example, if somehow or other patent or trademark filings go down during a given year, we have to respond to that. We can't spend money that we don't have.

So, right now, already as a government agency, we operate in that sense a little bit like the private sector. We don't have an appropriation of a certain amount of money where we can just go to the Federal Treasury and take money out of it. And, right now, those revenues are running about \$610 million a year. So we look at ourselves as a \$610 million business. That is what we are.

Mr. BONO. That basically is—

Mr. LEHMAN. We hope that that is going to grow to about a billion by the end of the decade. That is good news for American economy, because it means a lot of people are coming up with new technology and interested in using our services.

Mr. BONO. Well, there is no question in my mind that you have a great grasp on this industry and how it needs to be streamlined and that it does need to be streamlined. I think those are good representations.

Now you are talking about giving somebody a business that could gross a billion dollars a year. And one of my concerns there is, as it stands now, it doesn't represent big dollars to any individual, any kind of way. So I—by that, I think there is no reason to get cute or playing any games or to give honest representation. When you are a private corporation, you represent that big of an industry, that is a tremendous amount of power that you control—or that someone controls.

So on a broader scope, do we—my fear is we lose the equity here for the representation of the public. How would that be protected? There doesn't seem to be a strong accountability factor, as far as the representation is concerned.

Mr. LEHMAN. Well, I think we have to be careful when we talk about private, when we use the word privatizing the PTO. We are not privatizing it. We are using a device already in place, the Government Corporation Control Act, and both bills, the chairman's bill, H.R. 1659, and the administration proposal would reorganize the PTO under the Government Corporation Control Act.

Now, that doesn't mean we are going to issue stock to the public. It doesn't mean that the CEO or the managers are going to get stock options or anything like that. They will still be government employees. And under our bill they will be very much subject to the supervision of the Secretary of Commerce on all policy matters.

Furthermore, their compensation will be capped. The compensation of everyone but the CEO is capped at \$149,000, and the CEO can get a bonus of up to double that but only if he meets performance criteria that are established on an annual basis by the Secretary of Commerce.

And so it uses a private sector model. I think that is what a lot of private sector corporations do with their management and managers do with their subordinates is they say this is your performance, this is how we are going to judge you, and you will get paid a certain amount of extra money if you meet these criteria. But it is a very, very controlled situation.

As you pointed out, Mr. Bono, if we have just the most cracker-jack CEO person here and they meet all their performance goals, they will still be paid far less than the typical chief executive of even a \$600 million a year corporation. So we are taking a step—it is a next step—to make this Government organization work better.

But I don't think we should fool ourselves. This is not a private organization. This is an attempt to perfect government and make it work better. And we are all struggling with that in the administration and on the Hill, and we probably haven't come up with the perfect answers yet, but we think that your proposal and our proposals are steps in the right direction.

And I am sure that before you are done marking up this bill that it will be perfected even more and that we will probably want to come back and change it 10 years from now, but that is just a part of making progress.

Mr. BONO. Does your bill include copyrights?

Mr. LEHMAN. No. Our bill has nothing whatsoever to do with the copyright system or the Copyright Office, other than the fact that the Under Secretary of Commerce for Intellectual Property will, as is the situation now with me, continue to be the President's primary advisor and the Cabinet's primary advisor for the broad range of intellectual property issues, including copyright matters.

The Copyright Office, which registers copyrights, is currently located in the Library of Congress. We haven't chosen at this point to make any recommendations in that regard. We have responsibility and we are very concerned about policy matters, but that it is for this committee and for the Congress to determine the structure of the Copyright Office.

Mr. BONO. If there is a dispute over copyrights, does that stay here or would that go to—

Mr. LEHMAN. Well, there are rarely situations in which you would say there is a dispute over copyrights, because keep in mind that the way the Copyright Office works is that the Copyright Office registers copyrights. It records the property interest. The Copyright Office is very much like a register of deeds in real estate interests. A copyright subsists from the moment of creation of a

work. The Government agency doesn't have to give you a copyright for you to have it.

On the other hand, a patent or a trademark—

Mr. BONO. Let me interrupt you.

Mr. LEHMAN [continuing]. You only have when the Government gives it to you.

Mr. BONO. There is a dispute now over copyrights, over when copyright owners have the right to performance money or not, which is going on between many private industries and songwriters who hold copyrights. So there is a dispute. So where would that go?

Mr. LEHMAN. Those are policy decisions. And to the extent where you are primarily talking about legislation—there are two ways that the Government would get—

Mr. BONO. Under your structure, where does that go? Does it stay here or does it go to—

Mr. LEHMAN. Under our structure, and we believe under the current situation, that the views of the President of the United States and the administration are to be coordinated and led by the Department of Commerce and by the Under Secretary for Intellectual Property. And, right now, they are pretty much taken care of by me as the Assistant Secretary of Commerce. The Copyright Office is free to make its own views known, if they wish to do so. And indeed, in taking our positions on issues, we do consult with them.

Mr. BONO. This issue, this current dispute, would go to—

Mr. LEHMAN. The Under Secretary for Intellectual Property.

Mr. BONO. Rather than the legislation that is dealing with it right now?

Mr. LEHMAN. Well, no. I think what you are really talking about is the legislative matter. So it is really Congress that, decides.

But in terms of advising Congress—

Mr. BONO. Well, in terms of policy—

Mr. LEHMAN [continuing]. The President would look to the Under Secretary for Intellectual Property to advise him about that.

Mr. BONO. I think that is an area that sounds like it would have to be really cleaned up. It isn't really clear.

I still have the concern with the accountability, as far as representation is concerned. Sounds like it is going to the Secretary. He has the final voice, rather than this body. And that bothers me.

I think that there is an accountability factor here that might have to go beyond the Secretary. If he has—if he has the last word on this, that is a mighty, mighty powerful position. Just from a songwriter's standpoint I can tell you that would be a very big powerful position. I think that is an area we would have to clean up.

The other thing I wanted to say to you, that any business that I have been part of or involved in that is brandnew and even has other models operating goes through a shakeout period. And so when you structure a business, it is left up to your imagination, basically, or the knowledge that you do have, to that extent. But when it goes into practical use, it never—I have never seen it turn out the way you write it down on a piece of paper.

And I would—I would guess that what you are structuring there will never fully complete itself as you have written it. It will have a different—a different look than it has structured now. And I don't see any—anything in there for a shakeout period.

Mr. LEHMAN. Our legislation, Mr. Bono, actually will specifically provide for a review of the operations of the office at the end of 5 years and then changes to be recommended to Congress on the basis of that review precisely to deal with the issues that you have raised in your shakeout period.

Mr. BONO. Yes. I think you would have to probably look at it sooner than that. I think things would change within a year. You structure things and then you find out they don't work on a practical basis. Five years of operating that way might be, again, ineffective, but you have a contract that says to do it that way so you stick to that, however ineffective it is.

Mr. LEHMAN. I should point out that under our legislation, of course, the CEO operates under a 6-year contract with the Secretary. But every year the performance criteria are readjusted. So built into the management of the Corporation there is a yearly review.

Mr. BONO. Good.

Mr. LEHMAN. But there will be an overall review that would involve recommendations to Congress at the end of 5 years.

Mr. BONO. OK. Thank you.

Mr. MOORHEAD [presiding]. Thank you very much. And we want to thank you, Commissioner Lehman, for coming this morning. You had a pretty good workout here. We are glad you could be with us.

Mr. LEHMAN. Thank you very much.

Mr. MOORHEAD. Our second witness will be Dr. Harold Seidman, senior fellow at the National Academy of Public Administration and a charter member of the American Society of Public Administration. He is currently a guest scholar at the Center for Study of American Government with Johns Hopkins University and a professor emeritus at the University of Connecticut.

Dr. Seidman is a former Assistant Director for Management and Organization of the U.S. Bureau of the Budget, where he implemented the Government Corporation Control Act of 1945 and developed a model charter for Federal Government corporations. He has served as consultant to the Senate Committee on Governmental Affairs and as advisor to the United Nations in many countries on organization and management of public enterprises.

Welcome, Dr. Seidman. We have your written statement which I ask unanimous consent be made part of the record. Dr. Seidman, you may proceed with your oral testimony.

**STATEMENT OF HAROLD SEIDMAN, SENIOR FELLOW, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, ACCOMPANIED BY ALAN L. DEAN, SENIOR FELLOW, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION**

Mr. SEIDMAN. Mr. Chairman, thank you.

I am accompanied by Alan L. Dean, who is also a senior fellow at the National Academy of Public Administration. He is the former chairman of the board of trustees of the academy and was the vice president of a Government Corporation, the U.S. Railway Association. Mr. Dean was codirector of our PTO project, and the views I express in my statement reflect his views as well as my own.



We are pleased to accept your committee's invitation to testify on H.R. 1659 and on an administration bill to incorporate the Patent and Trademark Office and on H.R. 1756, the Department of Commerce Dismantling Act, insofar as it relates to the Patent and Trademark Office. We did not have available a final version of the administration bill; and our comments, therefore, are based on a September 6, 1995, draft.

We have had something, Mr. Chairman, of a moving target here, to keep up with the changes in the administration bill. When the Congress enacted the Government Corporation Control Act of 1945, it recognized that the budgetary, accounting and control systems designed for traditional tax finance agencies were unsuitable for revenue-producing and self-sustaining enterprises which must have the capability of responding to market demand. It had become evident that attempts to operate these enterprises as if they were traditional agencies made it difficult for them to operate in a businesslike manner, while failing to provide effective accountability to the President and the Congress.

I would emphasize that this corporation would be fully accountable to the Congress. The ultimate policymaking body for this Corporation would be the Congress of the United States.

In enacting the Control Act the Congress emphasized its intent to provide accountability without limiting the necessary operating and financial flexibility of the enterprises affected.

A wholly-owned Government Corporation remains a Federal agency, and its employees are Federal employees. It is subject to those laws that the Congress has deemed should apply to enterprises which are expected to operate in a businesslike manner without cost to the taxpayer.

As the Supreme Court ruled in the case of *Cherry Cotton Mills v. U.S.*, relating to the Reconstruction Finance Corporation, quote, "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by the Government to accomplish purely governmental purposes." This opinion was reaffirmed this year by the Supreme Court, *Michael Lebron v. National Passenger Railroad Corporation*.

After enactment of the Control Act, President Truman prescribed criteria for the use of government corporations in his 1948 budget message. Establishment of a Government Corporation was advocated for those programs which were predominantly of a business nature, revenue producing and potentially self-sustaining. These criteria were reaffirmed by the first Hoover Commission in 1949 and the National Academy of Public Administration's 1981 Report on Government Corporations.

A 1989 NAPA research team report, *Considerations in Establishing the Patent and Trademark Office as a Government Corporation*, concluded that the PTO met the basic tests for conversion to a Government Corporation. The PTO has provided convincing evidence that the powers normally vested in a Government Corporation would enable it to cope more effectively and economically with the rapidly increasing workload and to provide a better service to its customers. Patent and trademark applications have more than doubled from approximately 157,000 in 1980 to 341,000 in 1994.

The 1995 NAPA project team report, Incorporating the Patent and Trademark Office, documents the case for a PTO Corporation, describes the differences between a wholly-owned Government Corporation and a traditional agency, identifies essential corporate powers and appraises alternative organizational structures. Copies of the report have been provided to the committee.

While there may be some technical differences in language, we believe both H.R. 1649 and the draft administration bill provide the standard corporate powers and exemptions from existing laws required for the effective operation of a PTO Corporation. Consequently, we will not discuss the detailed provisions of the bill but limit our remarks to what we consider to be key differences and issues: one, organizational status; two, relationship to an executive department; three, appointment of a chief executive officer; four, advisory board; and, five, setting of fees.

It has been a long-established principle of executive branch organization that programs contributing to a definable major purpose of the Federal Government should be placed within the executive department which as nearly as possible shares the same major purpose or, alternatively, under the policy direction of the head of the department.

There are obvious advantages of having someone of Cabinet rank representing the Corporation's interests in dealing with the President, Congress and other executive departments, but this does not require that a Corporation be integrated in a department, as we believe is now proposed in the administration bill. Departmental staff are rarely conversant with or understand the special requirements of corporations and are reluctant to grant exceptions from rules and regulations generally applicable within the Department.

The problem is not direction from the Secretary. It is the fact that subordinate elements within a department are unwilling to recognize the unique character of a Corporation. They assume that one size must fit all and they must all conform to the same regulations. If the committee should report—the Congress should report the bill with the inclusion of the language recommended by the administration, we urge that language be included in the bill which would provide that general departmental regulations shall not apply to the Corporation unless the Secretary makes a finding and specifically so directs.

H.R. 1756 provides for the transfer of the PTO to the Department of Justice. The purpose of the PTO, as defined in article I, section 8 of the constitution, is "to promote the progress of science and the useful arts." This is not a purpose of the Department of Justice, which is concerned almost exclusively with law enforcement. If the PTO Corporation is to be associated with an executive department, it should be one whose major purpose is most closely associated with the PTO's basic mission.

H.R. 1659 provides for the establishment of the PTO Corporation as an independent agency. Complete independence is not regarded as a preferred option because of the need to provide direction with respect to intellectual property policy and to assure coordination with U.S. foreign and trade policy. Intellectual property protection is growing in importance as a result of enhanced economic competi-

tiveness, a global marketplace and advances in communications and transportation.

The September 6 administration draft establishes the PTO Corporation as an agency reporting to the Secretary of Commerce, and in the current draft within the Department of Commerce, but subject to policy direction of the Under Secretary of Commerce for Intellectual Property with respect to patents and trademarks. The appropriate role of an Under Secretary should be as principal staff advisor to the Secretary with respect to intellectual property policy.

It is highly undesirable to vest functions directly in an Under Secretary independent of the secretary. The proposed arrangement is calculated to promote conflict between the Under Secretary and the Corporation's chief executive officer. In our judgment, it would be preferable to create the Corporation as an independent agency, but subject to policy direction by the Secretary, not the Under Secretary.

Under both H.R. 1649 and the administration draft, management of the PTO Corporation is vested in a chief executive officer who shall be responsible for management of the Corporation. H.R. 1649 provides for the appointment of the corporate head by the President, by and with the advice of the Senate, for a 6-year term. The administration draft provides for appointment by the secretary and raises a serious constitutional question.

Under article II, section 3 of the Constitution, secretarial appointment would be permissible only if a chief executive officer was defined as an inferior officer. In view of the fact that powers would be vested directly in the CEO, classification as an inferior officer would be doubtful.

Furthermore, Mr. Chairman, I find no basis in the Constitution which would permit the appointment of a Federal officer under a contract with a secretary. That would be unprecedented. I know of no precedent for that.

The Constitution is very precise on appointing authority. It says Federal officers shall be appointed by the President by and with the advice and consent of the Senate, or the Congress may provide that inferior officers may be appointed by the heads of departments or the courts of law. And this certainly is not an inferior officer we are talking about here.

Furthermore, I find the proposed contract raises a basic policy issue. Presumably the policy guidance and direction to the chief executive officer should come from the law, not from provisions of a contract worked out and negotiated with a Cabinet head.

H.R. 1649 provides for an 18-member management advisory board consisting of 6 members appointed by the President, 6 by the Speaker of the House of Representatives and 6 by the President Pro Tem of the Senate. The board would have an independent staff. The board is to review the policies, goals, performance and user fees of the PTO Corporation, advise the corporate head. The administration draft makes no provision for an advisory board.

We believe that an advisory board is desirable to assure that users and others concerned broadly with intellectual property have effective access to the Corporation and are afforded opportunity to be consulted and to review its policies and operations. The Corporation shall provide the board such staff support as it may request.

The board should not have a full-time independent staff. Such a staff would not be fully occupied between board meetings.

Appointment of Board members by an agency head, rather than by the President, is likely to reduce delays in filling positions and reduce the likelihood of appointments based solely on political consideration. Appointment by Members of Congress would appear to be unconstitutional.

Under H.R. 1659, the majority of PTO fees would continue to be set by statute. PTO discretion is limited to making adjustments for inflation as measured by Consumer Price Index actually experienced in the prior fiscal year. The administrative draft authorizes a Corporation, in accordance with the Administrative Procedure Act, to set rates subject to approval by the Secretary of Commerce. Fees are to be set at a level to cover all costs of operating and maintaining the corporation, including depreciation and capital expenditures.

Mr. Hoke, I think, raised the question about fees. For any corporation, a fee should be based on costs in accordance with a statutory formula. And this is subject to the usual procedures required by the Administrative Procedure Act, including notice and hearing. In the case of disputes there would be ultimate appeal to the courts.

Incidentally, as a Government Corporation, this Corporation could sue and be sued. This is what has been provided in the case of every other corporation.

The Congress does not and should not act as the ratemaking body for Government Corporations. I think the Congress found with its experience with the Post Office, and before that with the Panama Canal, there were serious problems created when Congress attempts to set the rates for a Government Agency or Corporation. The interests of both the users and the Corporation are best served if the Corporation is authorized to set and adjust rates in accordance with the statutory formula providing for full recovery of costs. Users would be afforded an ample opportunity to review, comment on and object to any proposed changes in the fee structure.

From our study of the operations of the PTO and its current problems, we are convinced that the conversion to a wholly-owned Government Corporation, as would be accomplished by the bills now before the committee, will better enable the PTO to meet the challenge of the 21st century and to adapt its organization and mode of operations for present and future needs. And indeed, Mr. Chairman, the purpose of the legislation is to bring the PTO under that form of organization which the Congress determined in 1945 was best suited for effectively carrying out this type of activity.

Thank you.

Mr. MOORHEAD. Thank you very much.

[The prepared statement of Mr. Seidman follows:]

PREPARED STATEMENT OF HAROLD SEIDMAN, SENIOR FELLOW, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

My name is Harold Seidman. I am a Senior Fellow of the National Academy of Public Administration and the Center for the Study of American Government, Johns Hopkins University. As a government corporation specialist and later assistant director for management and organization of the Bureau of the Budget, I was respon-

sible for implementing the Government Corporation Control Act, and advising the President and the Congress on the organization, management, financing and control of incorporated and unincorporated government enterprises. I have served also as a consultant to the Senate Committee on Governmental Affairs and a number of foreign countries and international organizations. I am accompanied by Alan L. Dean, who is a Senior Fellow and former chairman of the Board of Trustees of the National Academy of Public Administration. Mr. Dean was a vice-president of a government corporation, the U.S. Railway Association, assistant secretary for administration, Department of Transportation and has conducted the Academy's annual seminar on the roles and management of government enterprises.

The National Academy of Public Administration (NAP A) is a non-partisan organization formed in 1967 to advance the effectiveness of public management through advice and counsel to all levels of government. In 1984, the Academy was chartered by an act of Congress, the first such charter granted to a research organization since that of the National Academy of Sciences in 1863. Our testimony today reflects our individual views and does not necessarily reflect the views of the National Academy of Public Administration or its Fellows.

We are pleased to accept your committee's invitation to testify on H.R. 1659, and on an administration bill to incorporate the Patent and Trademark Office (PTO), and on H.R. 1756, the Department of Commerce Dismantling Act, insofar as it relates to the Patent and Trademark Office. We did not have available a final version of the administration bill and our comments, therefore, are based on a September 6, 1995 draft.

When the Congress enacted the Government Corporation Control of 1945 (31 USC 9101), it recognized that the budgetary, accounting and control systems designed for traditional tax financed agencies were unsuitable for revenue-producing and self-sustaining enterprises which must have the capability of responding to market demand. It had become evident that attempts to operate these enterprises as if they were traditional agencies made it difficult for them to operate in a businesslike manner while failing to provide effective accountability to the President and the Congress. In enacting the legislation, the Congress emphasized its intent to provide accountability without limiting the necessary operating and financial flexibility of the enterprises affected.

A wholly-owned government corporation remains a federal agency and its employees are federal employees, but it is subject to those laws that the Congress has deemed should apply to enterprises which are expected to operate in a businesslike manner without cost to the taxpayer. As the Supreme Court ruled in the case of *Cherry Cotton Mills v. United States* (327 U.S. 536), relating to the Reconstruction Finance Corporation, "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by the government to accomplish purely governmental purposes." This opinion was reaffirmed this year by the Supreme Court (*Michael A. Lebron v. National Passenger Railroad Corporation*, February 21, 1995).

After enactment of the Control Act, President Harry Truman prescribed criteria for the use of government corporations in his 1948 budget message. Establishment of a government corporation was advocated for those programs which were predominantly of a business nature, revenue producing, and potentially self-sustaining. These criteria were reaffirmed by the first Hoover Commission in 1949, and the National Academy of Public Administration's 1981 *Report on Government Corporations*. A 1989 NAPA research team report, *Considerations in Establishing the Patent and Trademark Office as a Government Corporation*, concluded that the PTO met the basic tests for conversion to a government corporation. At the time of the 1989 report, user fees met only 56 percent of the costs of operating the program. The PTO is now fully funded by fees from the sale of its products and services. The PTO has provided convincing evidence that the powers normally vested in a government corporation would enable it to cope more effectively and economically with a rapidly increasing workload and to provide better service to its customers. Patent and trademark applications have more than doubled from 157,195 in 1980 to 341,499 in 1994.

The 1995 NAPA project team report, *Incorporating the Patent and Trademark Office*, documents the case for a PTO corporation, describes the differences between a wholly-owned government corporation and a traditional agency, identifies essential corporate powers, and appraises alternative organization structures. Copies of the report have been provided to the Committee.

While there may be some technical differences in language, we believe both H.R. 1649 and the draft administration bill provide the standard corporate powers and exemptions from existing laws required for the effective operation of a PTO corporation. Consequently, we will not discuss the detailed provisions of the bills, but limit our remarks to what we consider to be key differences and issues: (1) organizational

status; (2) relationship to an executive department; (3) appointment of a chief executive officer; (4) advisory board; and (5) setting of fees.

It has been a long established principle of executive branch organization that programs contributing to a definable major purpose of the federal government should be placed within the executive department which as nearly as possible shares the same major purpose, or alternatively, under the policy direction of the head of the department. There are obvious advantages of having someone of cabinet rank representing the corporation's interests in dealing with the President, Congress, and other executive departments, but this does not require that a corporation be integrated in a department. Departmental staff are rarely conversant with or understand the special requirements of corporations and are reluctant to grant exceptions from rules and regulations generally applicable within the department.

H.R. 1756 provides for the transfer of the PTO to the Department of Justice. The purpose of the PTO as defined in Article I Sect. 8 of the Constitution is "to promote the progress of science and the useful arts." This is not a purpose of the Department of Justice, which is concerned almost exclusively with law enforcement. If the PTO corporation is to be associated with an executive department, it should be one whose major purpose is most closely associated with PTO's basic mission.

H.R. 1659 provides for establishment of the PTO Corporation as an independent agency. Complete independence is not regarded as a preferred option because of the need to provide direction with respect to intellectual property policy and to assure coordination with U.S. foreign and trade policy. Intellectual property protection is growing in importance as a result of enhanced economic competitiveness, a global market place, and advances in communications and transportation.

The administration draft establishes the PTO Corporation as an agency reporting to the secretary of commerce, subject to the policy direction of the under secretary of commerce for intellectual property with respect to patents and trademarks. The appropriate role of the under secretary should be as principal staff adviser to the secretary with respect to intellectual property policy. It is highly undesirable to vest functions directly in an under secretary independent of the secretary. The proposed arrangement is calculated to promote conflict between the under secretary and the corporation's chief executive officer. In our judgment, it would be preferable to create the corporation as an independent agency, as provided in the administration bill, but subject to policy direction by the secretary, not the under secretary.

Under both H.R. 1649 and the administration draft, management of the PTO corporation is vested in a chief executive officer who shall be responsible for management of the corporation. H.R. 1649 provides for appointment of the corporate head by the President, by and with the advice of the Senate, for a six year term. The administration draft provides for appointment by the secretary and raises a serious constitutional question. Under Article II Sect. 3 of the Constitution, secretarial appointment would be permissible only if the chief executive officer was defined as an inferior officer. In view of the fact that powers would be vested directly in the CEO, classification as an inferior officer would be doubtful.

H.R. 1659 provides for an 18 member Management Advisory Board consisting of 6 members appointed by the President, 6 by the Speaker of the House of Representatives, and 6 by the President Tempore of the Senate. The board would have an independent staff. The board is to review the policies, goals, performance and user fees of the PTO corporation and advise the corporate head. The administration draft makes no provision for an advisory board.

We believe that an advisory board is desirable to assure that users and others concerned broadly with intellectual property have effective access to the corporation and are afforded an opportunity to be consulted and to review its policies and operations. The corporation should provide to the board such staff support as it may request. The board should not have a full-time independent staff. Such a staff would not be fully occupied between board meetings.

Appointment of board members by an agency head, rather than the President, is likely to reduce delays in filling positions and to reduce the likelihood of appointments based solely on political considerations. Appointment by members of the Congress would appear to be unconstitutional (*Federal Election Commission v. NRA Political Victory Fund*, 6 F 3 d. 821 (D.C. Cir. 1993)).

Under H.R. 1659, the majority of PTO fees would continue to be set by statute. PTO discretion is limited to making adjustments for inflation as measured by the consumer price index actually experienced in the prior fiscal year. The administration draft authorizes the corporation, in accordance with the Administrative Procedure Act, to set rates subject to approval by the secretary of commerce. Fees are to be set at a level to cover all costs of operating and maintaining the corporation, including depreciation and capital expenditures. Fifty percent discounts are to be

provided to small businesses, individual inventors, and non-profit organizations. The costs of trademark registrations and patent grants are to be calculated separately.

Congress does not and should not act as the rate-making body for government corporations. The interests of both the users and the corporation are best served if the corporation is authorized to set and adjust rates in accordance with a statutory formula providing for full recovery of costs. Users would be afforded an ample opportunity to review, comment on, and object to any proposed changes in the fee structure.

From our study of the operations of the PTO and its current problems, we are convinced that conversion to a wholly-owned government corporation, as would be accomplished by the bills now before the committee, will better enable the PTO to meet the challenges of the twenty-first century and to adapt its organization and mode of operation to present and future needs.

Mr. MOORHEAD. In your opinion, what type of qualifications are needed in the individual who heads the Patent and Trademark Office Corporation and for members of the advisory board?

Mr. SEIDMAN. I think they would certainly want one as the chief executive officer, first of all, who was experienced as a manager and an executive but who had background and experience in dealing with intellectual property issues. He has to combine the unique qualities of an effective executive with knowledge of the subject.

The advisory board members I think should be selected to represent a broad array of interests, including inventors, the patent bar, and all those who are concerned with the intellectual property issues. They should have an opportunity to be heard and to talk. I think this would be a value to both the chief executive officer and indeed the secretary, to have some outside group review what is going on, get the benefit of their advice.

Mr. MOORHEAD. Would you support the idea of an independent Inspector General for the new Government Corporation to be nominated by the President, confirmed by the Senate and required to conduct independent audits?

Mr. SEIDMAN. There is—again, to make clear, under the Government Corporation Control Act, there the provision is for an annual audit. And in the case of a Government Corporation, the audit shall be conducted by the Inspector General of the Corporation. Sometimes the I.G. is appointed by the President with Senate confirmation. In other cases, the Inspector General is appointed by the corporation. Or if—if there is no Inspector General, there shall be an annual independent audit by an auditor selected by the Corporation.

Under the administration draft bill, the auditor would be selected by the Secretary of Commerce, which again assures there be a degree of independence in selection.

I guess my own personal view—I regret very much that the Government Corporation Control Act was amended to eliminate the requirement for an annual audit by the General Accounting Office, which I think is preferable to an audit by an Inspector General who may not be fully qualified to carry on this kind of financial audit. But the act was amended to place this function in the Inspector General.

Mr. MOORHEAD. Would you support a smaller board, each member to be appointed by the sitting President for staggered terms, which would be granted a more active role than the advisory board proposed in H.R. 1469?

Mr. SEIDMAN. A board of directors, sir?

Mr. MOORHEAD. Yes.

Mr. SEIDMAN. The reason for having a board of directors of a private corporation is the board represents the shareholders. You have diversity of interest. You do not have that here. In almost every instance where we have had a board of directors of a Government Corporation, it has not worked well. Indeed, the Congress abolished the board of directors of the Resolution Trust Corporation.

And one of the Members of Congress pointed out, two heads are not necessarily better than one when they grow on the same body. Congress also abolished the board of the Reconstruction Finance Corporation. It found that the board structure made it difficult to hold anybody accountable for what was done. It promoted buck passing.

I think from the point of view of the Congress it is preferable to have a single executive to hold accountable. A part-time board of a Government Corporation usually functions as would be the proposed advisory board. We think that it is advisable to have management vested in a single head.

Mr. MOORHEAD. One of the duties of a board might be to appoint the Inspector General or to vote on an annual budget.

Mr. SEIDMAN. That has been done in the case of an independent corporation. We have a precedent for that. You can invest the appointing authority in a board only if it is an agency head.

In the case of the Post Office, the Post Office Board does appoint the chief executive officer of the Post Office. And under the draft legislation here, certainly the advisory board would be expected to comment and advise on the budget and other matters. They would certainly be accessible to reporting to the Congress. The advisory board include its observations and recommendations in an annual report to the Congress.

Do you have a statement?

Mr. DEAN. Mr. Chairman, Alan Dean.

I would supplement what has been said by noting that if the final legislation leaves the relationship with the Secretary of Commerce contemplated by the administration bill, then the Secretary, as has been explained by the Commissioner, handles many of the policy issues you might like to avoid.

On the other hand, there is a need for an organized advisory group that meets regularly and is well informed and interested in intellectual property.

Which can review but not direct the operations of the Corporation. This would be the role of the advisory board.

Mr. MOORHEAD. We are left with other legislation floating around in various places that affects what happens to this bill, too, and how it should be operating. We don't know whether there will be a Department of Commerce or not.

Mr. DEAN. That, sir, is a dilemma that we faced also.

Mr. SEIDMAN. May I make a suggestion? What we did in legislation creating on both the Panama Canal Company and the St. Lawrence Seaway Development Corporation, was to provide that the Corporation shall be subject to policy direction by the President of the United States or by the head of such agency as he designated.

Originally, the St. Lawrence Seaway Development Corporation was under Commerce, and later came under the Department of



Transportation when that was created. To create a Corporation under the policy direction of the President or the head of such agency as he might designate. Clearly defines the kind of relationship between the policymaking Secretary and the Corporation.

Mr. MOORHEAD. The last question I have, you state in your testimony that you believe the PTO should be able to set its own fees and budgets in accordance with the statutory formula. What about the fear that due to its monopoly status, the Corporation may be able to increase its budget by raising fees and disburse it by paying substantially more in salaries to managers than would normally be in order? Shouldn't Congress check the monopoly status of the corporation by maintaining control?

Mr. SEIDMAN. Absolutely. This was not brought up previously in the hearing. Under the Government Corporation Control Act—the Corporation each year must submit to the Congress an annual business-type budget, which is different from an agency budget because it provides the information which enables the Congress to determine the adequacy of the rate structure, provides those types of financial statements, includes costs such as depreciation, which are not normally included in an agency presentation.

Furthermore, under the act, you have to provide Congress with an annual management report which details all of these things; so in the process, the Congress has full opportunity to review, the rate structure and in the case of other corporations, has done so. It rates are carefully examined in congressional hearings either on the budge or management report.

Furthermore, like any other monopoly such as a public utility, you have all the remedies provided by law such as notice, and hearing. If the Corporation has not followed the law in setting the rates, users may appeal to the courts. The Corporation can—unlike a traditional government agency, can sue and be sued in its corporate name.

To give an example, the Panama Canal Company, before it was incorporated, had a statutory toll rate of 90 cents a ton or \$1 a ton. The Appropriations Committee said it ought to be raised to \$1 a ton. The agency said they needed \$1.60 a ton to cover costs. When we incorporated the Panama Canal and placed it on a businessline basis, as required by the Control Act, we found that not only that there shouldn't be any increase in the tolls, but that they should probably be decreased.

There is an incentive for the Corporation, as for any other body, to not raise rates because that creates problems in dealing with customers. If you raise rates, it can reduce the volume of your business. So in no instance that I know of where a Government Corporation has set the rates—and every one has had that authority—it has not created that kind of problems, where they are just going in for rate increases on an arbitrary basis.

Mr. MOORHEAD. Thank you very much for your expertise Dr. Seidman. Your comments have been very helpful. We appreciate your coming.

Mr. SEIDMAN. If we can be of further assistance to the committee, we would be delighted to do so.

Mr. MOORHEAD. If you have future advice for us, send it in.

Mr. MOORHEAD. We will have three witnesses testify on the third panel today. The first will be Mr. Michael Kirk, who is the executive director of the American Intellectual Property Law Association.

Mr. Kirk is no stranger to this subcommittee. He was with the Patent and Trademark Office from 1962 to 1995, where he rose from the rank of patent examiner to Deputy Commissioner. In 1991 and 1992, he served as the chief U.S. negotiator on the trademark-related aspects of the Intellectual Property Rights Agreement in GATT.

He is a graduate of Georgetown Law School and practices as a registered patent attorney with NASA. He was awarded the Jefferson Medal for Contributions to American Intellectual Property Law in 1992, received the Commerce Department's Gold Medal Award in 1984 and again in 1994, was awarded the Presidential rank of Meritorious Executive by both President Reagan and President Clinton. Welcome.

Our second panelist is Mr. Herbert Wamsley, executive director of Intellectual Property Owners, a nonprofit association representing nearly 100 companies and several universities and individuals who own patents, trademarks, copyrights and trade secrets. Before he came to IPO, he was with the U.S. Patent and Trademark Office, where he was Director of the Trademark Examining Operation, Executive Assistant to the Commissioner, legislative and international attorney, and patent examiner. He received his law degree from Georgetown University and an LL.M. degree in patent and trade regulation law from George Washington University. Welcome.

Our final witness on the third panel will be Mr. Donald Dunner, chair of the Intellectual Property Law Section of the American Bar Association. Mr. Dunner is a partner at Finnegan, Henderson, Farabow, Garrett & Dunner here in Washington, DC, and performs work in all phases of patent and trademark activities, including prosecution, licensing and validity and infringement studies. He holds a law degree from Georgetown University. You have to be from Georgetown to be in this group.

Is that Doug Henderson's law firm?

Mr. DUNNER. Indeed. He would be delighted to hear you say that.

Mr. MOORHEAD. He is a good friend.

He has served as a member on the Advisory Commission on Patent Law Reform, the U.S. Delegation to the Diplomatic Conference on the Revision of the Paris Convention, and the Advisory Committee of the Court of Appeals for the Federal Circuit. Welcome.

We have written statements from our three witnesses, and I ask unanimous consent they be made part of the record and ask that each of you summarize in 10 minutes or less, after which the subcommittee will address you with whatever questions they have.

**STATEMENT OF MICHAEL K. KIRK, EXECUTIVE DIRECTOR,  
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION**

Mr. KIRK. Thank you, Mr. Chairman. I appreciate very much the opportunity to appear before the subcommittee today to give the position of the American Intellectual Property Law Association on these proposals to transform the Patent and Trademark Office into

a Government Corporation. AIPLA strongly endorses this transformation, giving the Corporation sufficient independence to insulate it from micromanagement from the Cabinet-level department in which it might be situated, which is currently the Department of Commerce.

We believe there is no question but that the PTO could function more efficiently and effectively and provide users with higher quality and more responsive products and services if it were properly transformed into a Government Corporation.

AIPLA believes that legislation, properly crafted to accomplish this, would have the following attributes:

It would terminate the requirement in OBRA that required the PTO to ask Congress each year to appropriate to it the fees collected under the PTO surcharge. As you know, this year the PTO has had \$25 million taken from this account. The House has already voted to take \$21 million from next year's account and the Senate is currently considering taking \$55 million. This is reaching 8 percent of the total PTO budget. This must be stopped.

It would exempt the PTO from the Workforce Restructuring Act of 1994. Applying this administration-wide personnel ceiling to the PTO saves no taxpayer revenue. It forces the office to resort to more expensive contracting out of certain nonexamining functions and prevents it from keeping pace with the increase in applications filed. As time progresses, if there is no relief to this particular restraint, the PTO will begin losing additional funds through the loss of issue fees and maintenance fees. This is projected to reach \$10 million annually by the end of the century if there is no relief.

It would authorize the Corporation to acquire needed space directly without having to go through the General Services Administration. Based on the 1996 projection of the Patent and Trademark Office and current lease costs in the metropolitan area of northern Virginia, this could save the Patent and Trademark Office as much as \$10 to \$15 million annually in rent costs.

It would eliminate the back-door funding demands by the Department of Commerce. This year, the Patent and Trademark Office is paying \$10.8 million to the Department of Commerce on the basis of such demands.

It would exempt the PTO from the legal and regulatory constraints which ensure that the technology the PTO acquires for its patent and trademark search systems is always outdated and overpriced by the time of delivery.

It would give the Corporation flexibility in its human resource management to support its needs in a timely and effective manner, allowing it to recruit and retain employees with unique and scarce job skills in a competitive market.

Finally, it would free the Patent and Trademark Office from title 44, which forces the Office to obtain all of its major printing needs from, or through, the Government Printing Office, which imposes a 6-percent surcharge on work it subcontracts for Government agencies.

Coupled with these should be provisions to secure effective management and oversight. As discussed earlier this morning, the PTO is a significant business operation with over 5,000 employees and a budget this year of \$542 million. The position of Commissioner

demands knowledge not only of patent and trademark law but experience in labor relations, finance, human relations, procurement, data processing and a host of other disciplines. The legislation must guarantee the Commissioner an adequate minimum term, the possibility of continuing if his or her performance warrants, and it must provide compensation commensurate with the responsibilities of the position.

The Corporation must also have effective oversight mechanisms. One aspect of this is an advisory body comprised of users with significant experience in the patent or trademark fields, together with significant management experience. It is essential that there be representation from the independent inventor and small business communities.

The other aspect of an effective oversight mechanism would be the continuing close scrutiny by Congress of the operations of the Corporation. Periodic congressional oversight hearings have proven to be a very effective means of performance review.

Mr. Chairman, AIPLA believes that your legislation, H.R. 1659, achieves all of these objectives. It is an excellent bill, which would make significant and lasting improvements in the operation of the Patent and Trademark Office.

While we believe that H.R. 1659 could be improved with a more attractive financial package for the Commissioner, a more efficient selection mechanism for its management advisory board, and greater flexibility for the Commissioner and the management advisory board to establish a fee schedule, H.R. 1659 is a very sound bill which would bring significant and lasting improvements to the operation of the Patent and Trademark Office, and we urge that this be moved forward promptly.

Turning to the administration bill which, as Mr. Seidman indicated earlier, is a moving target, our comments, too, are based on the draft released by the Patent and Trademark Office to the public on September 7, dated September 6. On the basis of our evaluation of this legislation, we regret to say that in its present form, the administration's legislative proposal is unacceptable to AIPLA and we would oppose its enactment as not being in the best interests of our Nation's patent and trademark systems.

The administration's draft bill subjects the new organization it establishes to the policy direction of an Under Secretary of Commerce for Intellectual Property. While the benefit of a supportive and constructive role for a Cabinet Secretary has advantages in assisting the organization to resist improper influence by anonymous examiners in the Office of Management and Budget and elsewhere, we oppose the organization being subject to the policy direction of the Under Secretary. This degrades the position of the organization and reminds us of the subservient role of the Patent and Trademark Office in the 1970's and earlier.

The administration's bill has no provision for an advisory body to oversee the activities of the Corporation. Without an advisory body comprised of individuals with knowledge and experience in patents, trademarks, finance and a host of other disciplines, a critical element of effective oversight would simply be missing.

We strongly believe that the chief executive should be appointed by the President with the advice and consent of the Senate, and

not by the Secretary of Commerce. Otherwise, the status of the CEO will be lower than all of the Department's other senior officials if it is attached to a Cabinet department.

The administration's bill would compensate the CEO at 148,000 annually with an equal amount available as a performance-based bonus. We applaud the administration for this proposal because it is innovative, it is practical and it shows an openness to obtaining a meaningful and realistic compensation package for the type of talent that you will have to have to effectively run this organization.

The Corporation would be required to establish a joint committee of employees with equal numbers appointed by the corporation and by its unions. The joint committee would recommend the design and implementation of a range of things, including employee compensation and contributions by the Corporation to the retirement and benefits program.

We are concerned that this proposal simply does not provide sufficient checks to prevent escalation of the cost of running the corporation and places patent and trademark applicants in an untenable position. We find this unacceptable.

While the administration's bill purports to exempt the organization from any limitation on the number of employees it may hire, it does limit the number in fact by tying the number that they could increase to the percentage of increase in patent and trademark filings. The problem is that the PTO has been restrained from hiring for a number of years, so now they would be forced to live under a formula where they would start with a baseline that is insufficient and institutionalize that insufficiency. So we think this too is not the right direction to go.

Finally, we do not object in principle to delinking the fee-increases from the Consumer Price Index, but we believe that this flexibility should only be granted if there is a strong multidisciplinary advisory body to oversee the operation of the Corporation with a clear obligation on the part of the CEO to consult with the advisory body in advance of any proposal to establish a schedule of fees.

With respect to Mr. Chrysler's bill, we do not have a position on the bill generally, but we have major concerns regarding the proposal to move the PTO to the Department of Justice. If the PTO is to continue to report to a Cabinet official, it should be a department where the needs of the Patent and Trademark Office would not be diluted within that Department. We understand that Congressman Chrysler has invited you to incorporate H.R. 1659 into his legislation, and would certainly hope that a compromise in that direction could be achieved.

In conclusion, Mr. Chairman, we believe that the Patent and Trademark Office should be transformed into a Government Corporation and that H.R. 1659, rather than the administration's bill, is the better vehicle to use in crafting the final legislation. We stand ready to work with you and the subcommittee to achieve this important goal.

Thank you.

Mr. MOORHEAD. Thank you.

[The prepared statement of Mr. Kirk follows:]

PREPARED STATEMENT OF MICHAEL K. KIRK, EXECUTIVE DIRECTOR, AMERICAN  
INTELLECTUAL PROPERTY LAW ASSOCIATION

Mr. Chairman, I appreciate the opportunity to appear before the Subcommittee today on behalf of the American Intellectual Property Law Association (AIPLA) to present the position of the AIPLA on H.R. 1659, the Patent and Trademark Office Corporation Act of 1995; H.R. 1756, the Department of Commerce Dismantling Act; and, the United States Intellectual Property Organization Act of 1995 (a draft bill prepared by the U.S. Patent and Trademark Office and made public on September 7, 1995).

The American Intellectual Property Law Association is a 9,400 member national bar association, whose membership primarily consists of lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies and institutions involved directly or indirectly in the practice of patent, trademark, copyright, unfair competition law, as well as other fields of law affecting intellectual property.

The AIPLA strongly endorses transforming the Patent and Trademark Office (PTO) into a government corporation, with sufficient independence to insulate it from micro-management from the Cabinet level department in which it resides, currently the Department of Commerce. We believe that there is no question but that the PTO could function more efficiently and effectively, and provide users with higher quality and more responsive products and services if it were properly transformed into a government corporation.

BENEFITS OF A GOVERNMENT CORPORATION

Before commenting specifically on the bills before us, I would like to outline the advantages which AIPLA sees flowing from properly crafted legislation transforming the PTO into a government corporation.

It would terminate the requirement established in the Omnibus Budget Reconciliation Act of 1990 (OBRA) (Public Law 101-508), as amended, that the PTO ask Congress each year to appropriate to it the fees collected under the PTO surcharge so that the fees can be used for the purpose for which they were paid. According to the August, 1995 report of the National Academy for Public Administration (NAPA) entitled "Incorporating the Patent and Trademark Office," President Truman prescribed the basic criteria for transforming a government agency into a government corporation: 1) that its programs be predominantly of a business nature; 2) that it be revenue producing and potentially self sustaining; and, 3) that its programs involve a large number of business-type transactions with the public. The PTO fully meets these tests, but its operations have been hampered by the refusal of Congress to allow it to spend all of the surcharge fees it receives to supply the products and services for which they were paid. In the current fiscal year, Congress withheld \$25 million of surcharge fees from the PTO, and the House of Representatives has already voted to withhold \$21 million for fiscal year 1996. In the past four years, the Office has been refused permission to spend nearly \$60 million of fees paid by users of the patent system. Giving the corporation the authority to spend all of the user fees it collects without having to ask Congress to appropriate them is a vital need.

It would exempt the PTO from the Workforce Restructuring Act of 1994, 5 U.S.C. 3101 note; (Public Law 103-226) which mandates the reduction of Federal employment by 272,900 positions to help reduce the Federal deficit and fund the "Violent Crime Reduction Trust Fund." While we recognize that every government agency would like to be exempted from this legislation, we hasten to point out that, unlike other government activities, the patent and trademark functions are totally supported by user fees. They obtain no taxpayer revenues. It makes no sense to apply a deficit reducing program to activities which do not affect the deficit. The practical impact of the application of this personnel ceiling upon the PTO has been to force it to contract out certain non-examining functions in order to free up positions to hire examiners to process the increasing work loads—16% in patent applications and 11.6% in trademark applications as of the beginning of June. Since contractor employees are not counted against the staffing ceiling of the PTO, the vacancies created by the employees eliminated in these areas can be applied to patent and trademark examination. However, PTO experience in the late 1980's indicates that such contracting-out increases the cost of performing a function by an average of 30%. Thus, the failure to exempt the PTO from the Administration-wide personnel ceiling saves no taxpayer revenue and drives up the prices which users must pay.

There is another impact that the Workforce Restructuring Act has on the PTO. When the patent and trademark examining staff cannot keep pace with the increase of applications filed, fewer patents are issued and fewer trademarks are registered.

This in turn reduces the number of issue fees paid, and number of maintenance fees paid, and the number of trademark renewal fees paid. This further reduces the revenues the PTO receives to fund its operations. We understand that the PTO will be losing more than \$10 million annually from the loss of issue fees alone before the end of the decade if there is no relief.

It would authorize the corporation to directly acquire needed space on the most financially attractive terms. Currently, the PTO is subject to the Public Buildings Act of 1959 (40 USC 601 et seq.), which obligates it to use the General Services Administration (GSA) to fulfill its space needs. When the PTO needs additional space, it must request the GSA to obtain it. GSA then leases the desired amount of space directly from the property owner. Irrespective of the actual lease price paid by GSA, it charges a higher price to the PTO as a means of offsetting its cost of operation and augmenting the GSA Building Fund. Since the PTO currently occupies approximately 1.5 million square feet of office space, it is easy to recognize how being subject to the Public Buildings Act imposes unnecessary added costs to the PTO. Based on a survey in the Washington Post in January of last year, these added costs are almost certainly in the \$10 to \$15 million range annually.

Another aspect of this problem involves the budget and accounting rules of the Office of Management and Budget (OMB). The PTO leases for its current space in the Crystal City area of Arlington, Virginia are expiring starting in 1996. As the PTO began to consider acquiring space for the coming years, it was prevented from the most cost effective space acquisition arrangements due to the accounting rules of OMB. If the PTO were to purchase the needed space (which would obviously be the cheapest in the long run) or enter into a lease-to-purchase arrangement (which would be next cheapest), the entire purchase price, or the entire cost of the lease-to-purchase arrangement, would be considered as a capital outlay in the year of acquisition. Thus, these accounting rules have the effect of making either of the more cost-effective space acquisitions appear to create a larger deficit for the Federal Government, even though the entire cost would be paid by user fees and not taxpayer revenues. For this reason, OMB is requiring the PTO to obtain space under a lease, which will result in a higher total, long term cost to the PTO. The corporation must be able to acquire space directly and not be subject to such arbitrary and counter-productive accounting rules.

It would ensure freedom of operation with no micro-management by secretarial officers and mid-level bureaucrats of the Department of Commerce (or any other Department to which the PTO might be attached). This can be accomplished in different ways. One way would be to create a Government corporation independent of any Cabinet department reporting directly to the President. Such independence could also be obtained through a properly drafted corporate charter. As pointed out in the 1989 report of NAPA, a properly drafted legislative charter for a corporation can greatly reduce the danger of excessive intervention by secretarial officers while preserving a relationship with a cabinet officer. Today, the PTO is largely unprotected from any micro-management or demands in which various Department officials choose to engage. For example, the PTO is required to contribute each year to a Working Capital Fund of the Commerce Department. This "contribution" allegedly compensates the Department for the cost of services to the PTO. Not only is the value of such services to the PTO dubious to non-existent, but in fiscal year 1995 the Office also had the privilege of being the major contributor to the creation of an automated financial management system for the Department of Commerce. In total, these contributions for fiscal year 1995 came to \$10.8 million. Thus, whether the corporation is independent of a Cabinet department or properly insulated by its legislative charter, the corporation must be independent of the micro-management and demands which have been too frequent in occurrence in the recent history of the PTO.

It would exempt the PTO from the Federal Property and Administrative Services Act of 1949 (40 USC 471 et seq.) and the "Brooks Act" (40 USC 759). The combined effect of the application of these laws to the PTO is to significantly and unnecessarily complicate and delay the acquisition of information technology by the PTO. Together they ensure that the technology that the PTO acquires for its patent and trademark search systems is always outdated and overpriced by the time of delivery. The PTO itself estimates that while thirty-five months are required under these statutes for major information technology acquisitions (defined as acquisitions of at least \$20 million), the same technology could be acquired in thirteen months if these laws were not applicable to it. Both in terms of ensuring that the users of the patent and trademark systems enjoy the benefit of modern technology at the earliest practicable time and at the lowest cost, the corporation must be exempted from both the Brooks Act and the Federal Property and Administrative Services Act.

It would give the corporation the flexibility in its human resource management to support its needs in a timely and effective manner. The corporation must be able to adequately compensate employees with unique and scarce job skills in a competitive market. It must be able to offer adequate incentives in terms of job classifications and bonuses to retain such highly qualified employees. The corporation must be free from unnecessarily rigid and protective rules limiting its ability to address situations where an employee fails to perform adequately. The bottom line is that the corporation must be able to tailor its personnel practices and procedures to best accommodate its business needs, rather than being forced to fit under Government-wide rules generic to all Federal employees.

It must allow the corporation to fulfill all of its printing needs competitively on the open market without any arbitrary and unnecessary restrictions. The PTO is subject to sections 501-517 of title 44 which require it to obtain all of its major printing needs from, or through, the Government Printing Office (GPO). Sections 1101-1123 of title 44 allow GPO to impose its rules on such matters as form, style, and art work on PTO printing requests. On the basis of these authorities, the GPO imposes a 6% surcharge on work it subcontracts for government agencies which, in the case of the PTO, is expected to add \$175,000 to its printing costs in fiscal year 1995.

It would free the corporation from any unnecessary regulatory interference with its ability to serve its constituents. For example, under the Paperwork Reduction Act (44 USC 3501 et seq.), the PTO must submit any survey of its constituents' needs with ten or more questions to OMB before it can use the survey. OMB can, and frequently does, take most of the 90 days allowed under the Paperwork Reduction Act to respond. Such unproductive red tape obligations must be eliminated.

#### MANAGEMENT AND OVERSIGHT

The statutory authorities and flexibilities outlined above provide the necessary framework for a manager to effectively govern the corporation. However, there are two crucial and interdependent requirements to make this governance process function properly. First, the corporation must be able to hire and retain an effective manager for the corporation. The history of the PTO in this regard has been spotty over the years. Individuals who sought the position of Commissioner of Patents and Trademarks understood that they could expect their job security to last no longer than the term of the President currently in office. In fact, over the past twenty years, no less than seven different individuals have occupied the position of Commissioner. And, on top of that, the current salary for the Commissioner is only \$115,700. It should be no surprise that most of the seven had previously retired prior to or could retire during their tenure as Commissioner.

The PTO is a significant business operation. It has 5,200 employees, and an annual budget of \$542 million. It expects to receive nearly 200,000 patent applications and 160,000 trademark applications in the coming fiscal year. The position of Commissioner demands knowledge not only of patent and trademark law and prosecution, but also experience in labor relations, finance, human relations, procurement, data processing and a host of other disciplines. In the political context in which the PTO has existed, it is little wonder that the Office has not been able to achieve the management stability desirable for such an important operation. The legislation must guarantee the corporate manager of the Corporation an adequate minimum term, with the possibility of continuing if his performance warrants it. To attract and retain the type of knowledgeable, experienced individual needed, it must pay the manager a salary commensurate with the salaries paid to others leading comparably sized and complex organizations.

Second, the corporation must have effective oversight mechanisms. One aspect of this is an advisory body comprised of users with significant experience in the patent or trademark fields, together with significant management experience. The advisory body should also include members with demonstrated experience in other fields, including finance, automatic data processing, labor relations and information dissemination. It is essential that there be representation from the independent inventor and small business communities.

It should be the function of the advisory body, with the assistance of a small permanent staff, to oversee the operations and finances of the corporation, including the quality and timeliness of patent grants and trademark registrations, the reasonableness of the fee schedule, and the financial performance of the corporation. It should provide advice directly to the manager of the corporation and provide annual written reports both to the manager and to the Congress on the performance of the corporation. Finally, the advisory body should ensure that the financial statements



of the corporation are audited annually by an independent certified public accountant.

The other aspect of an effective oversight mechanism would be the continuing, close scrutiny by the Congress of the operations of the corporation. In addition to an annual report from the advisory body, the Congress should receive reports from the manager of the corporation, as well as from the independent certified public accountant auditing the corporation's financial statements. Periodic Congressional oversight hearings have also proven an effective means of performance review.

Mr. Chairman, that outlines what the AIPLA believes should be the objectives for legislation to transform the PTO into a government corporation. Against that backdrop, I can state that the AIPLA believes that H.R. 1659 achieves these objectives far more effectively than the Administration's bill and we strongly support its enactment. H.R. 1659 would bring significant, lasting improvements to the operation of the Patent and Trademark Office and we would urge that it be promptly reported and sent to the House floor for adoption. We do have a few comments with respect to the manner in which H.R. 1659 measures up against the objectives we have set forth, as well as some suggestions for its amendment. However, our suggestions should in no way be understood as detracting from the very strong support of the Association for H.R. 1659.

#### H.R. 1659

Section 101 of H.R. 1659 amends section 1 of title 35 to establish the Patent and Trademark Office as a wholly owned Government corporation. Section 102 of the bill then sets forth the powers and duties of the Patent and Trademark Office in amended section 2 of title 35. While AIPLA finds the specific powers enumerated in the amended subsection 2(b)(6) to be quite good, we note that there is no express exclusion of the application to the corporation of the Public Buildings Act of 1959 (40 U.S.C. 601 et seq.) or the "Brooks Act" (40 USC 759). We would suggest that the PTO be expressly excluded from the reach of these laws so as to not interfere with the PTO's ability to construct, purchase, and lease real property. In addition, the subsection should be amended to cover the sale of such property and, in that regard, the PTO should be expressly excluded from the provisions of the McKinney Act (42 USC. 1411-12).

Section 103 amends section 3 of title 35 to establish the position of Commissioner of Patents and Trademarks and to enumerate the duties of that position and the conditions under which an incumbent will serve. In amended subsection 3(a)(1), it is stated that "The Commissioner shall be a person who, by reason of professional background and experience in patent and trademark law, is especially qualified to manage the Office." We believe the qualifications for the Commissioner should be strengthened and, in that regard, would suggest that he or she be required to have significant, demonstrated experience in management, in addition to patent and trademark law.

Amended subsection (a)(5) of section 3 provides that the Commissioner is to be compensated at the rate of pay in effect for level II of the Executive Schedule (currently \$133,600). While this is clearly an improvement over the present situation, in the interests of attracting the most qualified person, AIPLA would like to see the compensation set at a level consistent with the duties and responsibilities of the Commissioner.

Amended subsection (b)(1) of section 3 requires the Commissioner to appoint two Deputy Commissioners, one for patents and one for trademarks, for terms that expire on the date on which the Commissioner's term expires. AIPLA would not limit the terms of the Deputy Commissioners to be co-extensive with that of the commissioner. A Deputy Commissioner who is performing well should be allowed to continue in that position for as long as he or she wishes. On the other hand, one whose performance is not acceptable should be removed promptly. In addition, we should suggest that the qualifications of both Deputy Commissioners be augmented by requiring, in addition to experience in patent and trademark law, respectively, significant management experience.

Amended subsection (b)(2) of section 3 states that "The Office shall not be subject to any administratively or statutorily imposed limitation upon positions or personnel." We believe this provision should be clarified by specifically stating that there shall be no limitation on the "numbers" of personnel.

The basic pay of an officer or employee of the Office is limited in amended subsection(c) of section 3 to the annual rate of basic pay in effect for level III of the Executive Schedule (currently \$123,100). The total compensation for an officer or employee is subjected to an overall cap at the level of basic pay for level I of the Executive Schedule (currently \$148,400). In the interest of obtaining and retaining

the best qualified officers and employees, we believe that only the level I cap on total compensation should apply.

Amended subsection (g) of section 3 regulates the application to the Office of Chapter 71 of title 5 dealing with labor management relations. AIPLA recognizes that this is a very sensitive and important area and that certain adjustments of the respective negotiating rights of management and labor are necessary in view of the fact that H.R. 1659 properly excludes application to the Office of certain chapters of title 5. Nevertheless, AIPLA would like the bargaining rights and responsibilities of the Office and its employees to track as closely as possible the rights presently granted to them in title 5, subject only to those amendments necessitated to accommodate the exclusions of title 5.

Section 104 adds a new section 5 to title 35 establishing a Patent and Trademark Office Management Advisory Board. The Board is to consist of eighteen members, with six each to be appointed by the President, the Speaker of the House of Representatives, and the President pro tempore of the Senate. Not more than four of the six members appointed by each of the authorities shall be members of the same political party.

While AIPLA appreciates the sharing of the responsibilities to appoint the members of the Board, we believe that it might be more efficient to simply allow the President (or the Secretary of a department to which the Office might be attached) to appoint the members of the Board. This would also facilitate selecting Board members with the right mix of experience and knowledge.

With regard to the criteria for appointment, subsection (b) of new section 5 only requires that the members represent the interests of diverse users of the Office and include individuals with substantial background and achievement in corporate finance and management. As indicated earlier, AIPLA certainly agrees on the need for some members of the Board to have substantial background and achievement in corporate finance and management, however, we believe that the majority of the Board should have significant, demonstrated experience in patent or trademark prosecution and enforcement.

We particularly endorse subsection (f) of new section 5 calling for the Board to employ a staff adequate to carry out its functions. In that regard, we would suggest that the staff be six to ten employees, with a mix of expertise in patent and trademark law, finance, automation, management, and information dissemination. In addition, the Board should be able to compensate its staff at the same rate suggested earlier for officers or employees of the Office.

Section 111 of H.R. 1659 concerns funding of the Office. By leaving section 41 of title 35 intact, the fees of the Office would continue to be set by statute, subject to annual adjustment by no more than the rise or fall in the Consumer Price Index. AIPLA believes that the Commissioner should have greater flexibility in establishing the fees paid by patent and trademark applicants and other recipients of services and products of the Office. We believe that the Commissioner, in consultation with, and upon the advice of, the Management Advisory Board, should be able to determine the appropriate level of fees for the optimum operation of the Office. We believe that the oversight of the Board, coupled with the reports to, and oversight by, the Congress, will provide more than adequate protection to ensure against any inappropriate increases in fees.

Mr. Chairman, AIPLA believes that these suggested amendments would strengthen and improve H.R. 1659. However, while we believe that certain aspects of the legislation should be modified, the potential improvements to the operation of the Patent and Trademark Office which would flow from enactment of your legislation should not be lost because there is not complete harmony on the details. H.R. 1659 is a sound bill which would make very desirable improvements to the operation of the Patent and Trademark Office, and we strongly recommend that this Subcommittee report legislation along the lines we have suggested at the earliest possible date.

#### THE UNITED STATES INTELLECTUAL PROPERTY ORGANIZATION ACT OF 1995

Our comments on the Administration's bill are based on a draft prepared by the U.S. Patent and Trademark Office which was released to the public on September 7, 1995. While PTO officials cautioned that this draft bill had not yet received formal clearance for submission to the Congress, it was stated that any changes were expected to be minor. Therefore, in the interests of providing the Subcommittee with the views of the AIPLA on what is expected to be the position of the Administration on the issue of transforming the PTO into a government corporation, we have evaluated this draft bill. On the basis of our evaluation, we regret to say that, in its present form, the Administration's legislative proposal is unacceptable and we op-

pose its enactment as not being in the best interests of our nation's patent and trademark systems.

It would not accomplish a number of the objectives set forth at the outset of this statement. The AIPLA could support its enactment only if a number of amendments were made.

Turning to the details of the Administration's draft bill, Section 101 amends section 1 of title 35 to establish the United States Intellectual Property Organization as an agency of the United States reporting to the Secretary of Commerce, subject to the policy direction of the Under Secretary of Commerce for Intellectual Property with respect to the examination of patent and trademark applications. Section 102 amends section 2 of title 35 to empower the Corporation to carry out certain functions and duties "under the policy direction of the Under Secretary for Intellectual Property." As previously stated, the AIPLA strongly supports transforming the Patent and Trademark Office into a government corporation which is free from the micro-management of secretarial officers and mid-level bureaucrats of the Department of Commerce or other Cabinet departments. While the benefit of a supportive and constructive role for a cabinet Secretary has advantages in assisting the Organization to resist improper interference by anonymous examiners in the Office of Management and Budget, AIPLA opposes the Organization being subject to the policy direction of the Under Secretary for Intellectual Property. This degrades the position of the manager of the Organization and is remindful of the subservient role in which the PTO was placed in the 1970's. If the Organization is to be in a cabinet department, the head of the Organization must report directly to the Secretary and only for general policy direction.

We note that Sections 101, 102 and other Sections of the Administration's bill only empower the Organization to examine patent and trademark applications. The authority to grant patents and register trademarks is given to the Under Secretary. At best, this division of tasks is meaningless; at worst, it could seriously disrupt the processes of the Organization. Clearly, the Government Corporation Control Act envisions the handling of processes such as the examining of patent and trademark applications and their grant and registration by a corporate form of organization. Complete authority for the entire function of processing patent and trademark applications to grant and registration should be assigned solely to the Organization.

Section 103 amends subsection (a) of section 3 of title 35 to set forth the method of appointment and qualifications for, and conditions of service of, the Chief Executive Officer (CEO). Under this subsection, the CEO is to be appointed by the Secretary of Commerce. The AIPLA strongly believes that the position is deserving of appointment by the President with advice and consent of the Senate. Otherwise, the status of the CEO is lower than all of the Department's other senior officials. There may also be Constitutional issues raised if the CEO is not appointed by the President. Moreover, while subsection (a) of section 3 does require the CEO to have professional experience regarding patents or trademarks and to have management experience, we believe it would be appropriate to strengthen the qualifications by emphasizing that this be "significant, demonstrated" professional experience.

Amended subsection (b)(1) of section 3 states that the CEO shall be "responsible for the management and direction of the Corporation." Amended subsection (b)(2) of section 3 states that the CEO "shall be subject to the direction of the Under Secretary for Intellectual Property on patent and trademark policy matters." As previously noted, the AIPLA strongly opposes to the CEO being subject to the direction of the Under Secretary for Intellectual Property. This not only allows continuation of the present micro-management of the PTO; it continues an unacceptable degree of control by the Department.

Amended subsection (b)(3) of section 3 provides that the CEO shall be compensated in an amount not to exceed Level I of the Executive Schedule (currently \$148,000). An equal amount may be awarded as a bonus by the Secretary based on the CEO's performance. AIPLA applauds the Administration for this realistic and practical approach to providing appropriate incentives for attracting the type of managerial skills the Corporation needs.

Amended subsection (e) of section 3 provides that no other officer or employee of the Corporation shall receive basic compensation in excess of the basic rate of pay for level III of the Executive Schedule (currently \$123,100) or that for the Senior Executive Service ES-6 (currently \$115,700). For the reasons stated with regard to H.R. 1659, we believe that the only cap for the total compensation for other officers and employees should be level I of the Executive Schedule (currently \$148,400).

Subsection (j) of section 3 requires the Corporation to establish a joint committee of employees with equal numbers appointed by the Corporation and designated by the labor organizations accorded exclusive recognition. The joint committee is to assist the CEO by recommending the design and implementation of any position clas-

sification system, system to determine qualifications and procedures for employment compensation and awards system, and contributions of the Corporation to the retirement and benefits program.

AIPLA regards this proposal as totally unacceptable. While we do not object to the status quo of management and labor rights and obligations as set forth in title 5, this scheme clearly places patent and trademark applicants in an untenable position. It does not provide sufficient checks on the ability of the unions to unacceptably escalate the cost of running the Corporation.

While the first sentence of subsection (m) of section 3 purports to exempt the Organization from any restriction or limitation on the number of employees it may hire, the second sentence then limits the number by tying any increases to the percentage of increase in patent and trademark application filings. Since the PTO has increasingly been prevented in the past from hiring enough additional employees to keep pace with increased filings due to the Workforce Restructuring Act, this provision, by utilizing an insufficient base, would institutionalize that insufficiency. The number of employees of the Organization should be a matter left solely to the CEO with oversight by an advisory body.

The Administration's bill has no provision for an advisory body to oversee the activities of the Corporation. Without the oversight of an advisory body comprised of individuals with knowledge and experience in patents, trademarks, finance, automation and labor relations, aided by a permanent, highly qualified staff, AIPLA opposes enactment of the Administration's bill.

Section 109 of the Administration's bill amends section 41 with regard to establishing fees. It would allow the Corporation to recommend a schedule of fees which must be approved by the Secretary before adoption. Fee increases would not be limited to increases in the Consumer Price Index. While the AIPLA does not in principle object to de-linking fee increases from the Consumer Price Index, it should only be granted if there is a strong, multidisciplinary advisory body to oversee the operation of the Corporation and a clear obligation on the part of the CEO and others in the Corporation to consult fully with the advisory body in advance of any proposal to establish a schedule of fees. While we agree that the Corporation needs flexibility with regard to its fee setting authority, we also believe it is imperative that appropriate oversight and guidance be possible to ensure that the interests of users are fully reflected in any proposal advanced or adopted by the Corporation. On the other hand, we do not believe that layering the approval of the Secretary on the fee setting process is necessary or desirable. Such control only heightens our concerns about the Administration's bill continuing the meddling by the Department in the operations of the Corporation.

Revised subsection (e)(5) of section 41 provides that the provisions of OBRA establishing the surcharge shall not apply to the revenues of the Corporation after October 1, 1998. AIPLA believes it is inappropriate and dangerous to continue these provisions of OBRA for three years and believes they must be terminated effective with enactment of the Administration's bill.

Section 118 of the Administration's bill calls for the Secretary to provide a report not later than five years from enactment on the operation and effectiveness of the legislation, together with any recommendations for change. Again, this provides yet another invitation for officials in the Department of Commerce to micromanage the operations of the Organization. Any review of the effectiveness of the Organization should come from annual reports of an advisory body and oversight hearings by Congress.

Title II of the Administration's bill creates the position of Under Secretary for Intellectual Property in a new section 1503c. Subsection (b)(3) of new section 1503c assigns to the Under Secretary the task of advising the Corporation on patent and trademark policy. We do not oppose the creation of such an Under Secretary position. What we do oppose is its proposed relationship to the Corporation. As we indicated in our comments on amended section 2 of title 35, this return to the reporting arrangements of the 1970's is unacceptable.

Subsection (b)(9) of new section 1503c requires the Under Secretary to advise the Secretary on programs and studies which the Corporation is carrying on cooperatively with foreign patent and trademark offices and international intergovernmental organizations. This function of the Under Secretary should be eliminated. The Chief Executive Officer of the Corporation will be closer to his programs, and therefore better able to advise the Secretary on his activities. Also, for the Under Secretary to acquire the knowledge of the cooperative programs and studies of the Corporation needed to advise the Secretary would lead to the type of interference which should be avoided.

The Department of Commerce Dismantling Act, H.R. 1756, would re-establish the Department of Commerce as the Commerce Programs Resolution Agency, an independent Agency in the Executive Branch. The Agency would be headed by an Administrator appointed by the President to oversee the transfer and abolition of the functions of the Department of Commerce. The Commerce Programs Resolution Agency itself would be abolished three years from the effective date of enactment of H.R. 1756.

Section 205 of H.R. 1756 would transfer the Patent and Trademark Office to the Department of Justice. It would amend the OBRA to allow the Patent and Trademark Office to use the fees generated by the surcharge without an annual appropriation from the Congress. Finally, H.R. 1756 would give the Commissioner complete freedom to adjust patent fees annually to cover the estimated cost of operation of the Office. Annual adjustments of the trademark fees would presumably remain limited to increases in the Consumer Price Index.

AIPLA has not developed a position on the proposed elimination of the Department of Commerce; however, we have major concerns regarding the proposal to move the PTO to the Department of Justice. There are a number of reasons for our concerns.

First, we take note that the Civil Division and the Antitrust Division of the Department of Justice, by virtue of their clients and statutory mission, almost always take positions against the validity and/or enforceability of patents. The Civil Division, in defending patent suits against the Government, routinely alleges that the patent in question is invalid and, if valid, is not infringed by the Government agency charged. The Antitrust Division, to the extent that it is involved with specific patents, traditionally argues that the patent has been used in some sort of anti-competitive scheme which warrants denying the patent holder the enforceability of the patent in question. In fact, we are not aware of any office in the Department of Justice that would normally have the responsibility of arguing to uphold the validity and enforceability of patents.

In addition, there has always been a certain tension between the laws protecting intellectual property and the laws regulating competition. After all, intellectual property rights are designed to provide commercial exclusivity that may preclude parties from utilizing the creations of others for limited periods of time. Nowhere has this tension been more evident than in the debates over the years regarding intellectual property policy between the PTO and the Antitrust Division. This is not intended to impugn the Department of Justice or the necessity for strong and vigorous enforcement of this nation's anti-trust laws. Rather, it is to urge that, if the PTO is to continue to report to a cabinet level official, it not be in a department where the needs of the PTO would be diluted by competing interests from within that department.

We note that those functions involving the licensing of patents arising from Government funded research assigned to the Department of Commerce have always been kept separate from the activities of the PTO. This separation was believed to be required because of the appearance of a conflict of interest that would arise if the same bureau was both granting and licensing patents. This appearance of conflict would, in our opinion, be much more serious in a situation where a Government Department had the responsibility of issuing patents with a presumption of validity, while simultaneously arguing that this statutory presumption should be set aside with respect to specific patents because its clients were defending themselves against the patents in question.

For all of the foregoing reasons, we do not believe that the PTO should be moved to the Department of Justice. While several alternative possibilities come to mind, we note that the Heritage Foundation, in considering the elimination of the Department of Commerce, suggested that the PTO be transferred to the Treasury Department. There could be other equally appropriate places for the Office to reside, but it is our very strong view that the Department of Justice is not one of them.

We have previously joined with Intellectual Property Owners, Inc. and the Pharmaceutical Research and Manufacturers Association to urge Congressman Chrysler to consider H.R. 1659 as an alternative to his legislation. We understand that by correspondence dated July 26, 1995, Congressman Chrysler has invited you to incorporate H.R. 1659 into H.R. 1756. We would agree with such a merger.

#### CONCLUSION

AIPLA believes that the PTO should be transformed into a Government corporation, free to operate without micro-management and interference from secretarial officers and mid-level bureaucrats and untethered from the red tape and regulatory

morass that has limited the ability of the PTO to serve its customers. This could be accomplished either by making the PTO an independent Government corporation or, if under the umbrella of a cabinet level department, appropriately insulating it in its legislative charter.

As our comments have shown, H.R. 1659, rather than the Administration's bill, far more effectively achieves these objectives and is the better vehicle to use in crafting the final legislation. We stand ready to work with you and the Subcommittee to achieve this important goal.

Mr. MOORHEAD. Mr. Wamsley.

**STATEMENT OF HERBERT C. WAMSLEY, EXECUTIVE  
DIRECTOR, INTELLECTUAL PROPERTY OWNERS**

Mr. WAMSLEY. Thank you, Mr. Chairman. I appreciate the opportunity speak today on behalf of Intellectual Property Owners, IPO, in support of establishing the Patent and Trademark Office as a Government Corporation.

IPO enthusiastically endorses the Moorhead-Schroeder bill H.R. 1659, which we believe will enable the Patent and Trademark Office to provide more cost-effective patent and trademark processing for all companies, universities and inventors, large and small, including the members of our association.

Mr. Chairman, H.R. 1659 is legislation that can make a difference. It reinvents the Patent and Trademark Office. It is a long overdue proposal for unshackling the Office from the restraints and Government redtape that have prevented the office from providing first-class service to its customers. First-class service for inventors and those who invest in research and development and commercialization of new technology will translate into a stronger national economy and a better standard of living for Americans.

While we can all agree, I think, on the broad objectives for a Patent and Trademark Office Government Corporation, as often is the case, the devil is in the details. At IPO, we believe that any government corporation must have as an essential feature the type of operating flexibility for the Commissioner that is found in H.R. 1659. This includes flexibility in employee compensation, numbers of employees hired, personnel policy, contracting and management of office space. It also includes managerial independence from the Department of Commerce, which has had a long history of micromanaging the Patent and Trademark Office.

We also strongly support the provisions in H.R. 1659 giving the Office the ability to use all of the patent and trademark fees that it collects from its customers. IPO's members consider the recent actions by the Appropriations Committee, withholding patent surcharge money from the office, to be outrageous. Patent applicants are being taxed to support the programs of the National Oceanic and Atmospheric Administration of the Department of Commerce and other agencies. The 1990 Budget Act needs to be amended.

We agree that the Patent and Trademark Office should have borrowing authority as proposed in H.R. 1659. Money should be borrowed to finance capital improvements and to cope with fluctuations in fee income.

We believe H.R. 1659 wisely retains the existing procedure under which fees are set by Congress and annual inflationary adjustments are made by the Commissioner in accordance with changes in the CPI.

We believe the Patent and Trademark Office Government Corporation does not need to set its own fees in order to operate on a businesslike basis. The levels and types of patent and trademark fees are important policy issues. The Consumer Price Index limitation on the amount of annual fee adjustments imposes some cost control discipline on the Office, which, unlike private businesses, has no cost control pressures stemming from competition.

We also believe it is essential to have an advisory board along the lines of the one proposed in H.R. 1659 to provide a mechanism for the Office's customers and other interested members of the private sector to advise the executive branch and the Congress on management of the Office.

Turning for a moment to labor-management relations, a topic discussed at some length earlier today, we believe the Commissioner must have flexibility. The Commissioner must have flexibility to hire the best employees, reward top performers, fire nonperformers, and move people around. We believe H.R. 1659 takes the correct approach by prohibiting labor organizations from striking, bargaining over compensation, or bargaining over the number of employees assigned to work projects or the technology and means of performing work.

We agree that labor organizations should retain their traditional right to bargain over the impact and implementation of changes in the workplace as proposed in H.R. 1659. A misstatement was made earlier to the effect that H.R. 1659 does not preserve the existing structure for labor organizations in the Federal Government. In fact, H.R. 1659 preserves nearly all of chapter 71 of title V of the United States Code.

We certainly would agree with the comments made this morning by Mrs. Schroeder that there is no place for patronage appointments in the Patent and Trademark Office Government Corporation. We would be strongly opposed to any structure that opened the door to that, and we believe that H.R. 1659 would not open that door.

We would also support, as suggested by Mrs. Schroeder, appropriate provisions for—

Mr. MOORHEAD. Can I ask you a question? Would you have a civil service examination process or how are you going to avoid the patronage?

Mr. WAMSLEY. The bill calls for the Commissioner to set up a new personnel system, which would include procedures for hiring employees. The bill gives flexibility to depart from the existing system administered by the Office of Personnel Management, which we believe experience has found to be too slow and too cumbersome. But nevertheless, there would have to be a merit system; and there are provisions in title V of the United States Code that would apply, requiring fairness and merit principles, and any hiring system would have to follow that.

Mr. MOORHEAD. I wanted to, while you were talking about this—I have been approached by many people that are concerned about the fact that they thought that someone could be fired without cause and so forth. I would like your comments about that at this point.

Would you—there should be in the system that there be cause for any kind of removal, should there not be?

Mr. WAMSLEY. I think any personnel system should require cause for removal except possibly for the positions at the highest executive levels, and I would be confident that the Commissioner, in designing the personnel system as authorized by this legislation, would include the cause for removal limitations.

Mr. MOORHEAD. You would include all of their retirement and civil service benefits that any employee of the Government would receive?

Mr. WAMSLEY. Yes. Those rights need to be protected and in fact would be protected under both 1659 and the administration's bill.

Mr. MOORHEAD. Thank you.

Mr. WAMSLEY. In summary, in the labor-management area, when balancing between the rights of management and labor, it must be kept in mind that the Patent and Trademark Office Corporation will be a monopoly. It is the only place the public can go for patent and trademark processing. As a user-fee-funded agency, the Office will be insulated from the budgetary pressures that are facing regular agencies today. So we can't, or the Congress shouldn't, use either strictly the Government model for regular agencies or the private-sector model, but we believe the provisions in H.R. 1659 are appropriate.

Turning quickly to the administration's draft bill, at Intellectual Property Owners, IPO, we are intrigued by the fact that the administration plans to rename the Office the U.S. Intellectual Property Organization, or IPO. We are happy to hear that the administration does support the concept of a Government Corporation which has the same broad objectives as the one that is being proposed in H.R. 1659. Reluctantly, like the AIPLA, we have concluded that we would oppose the bill in the form of the administration draft of September 6, 1995, which is the latest version of the moving target. That draft, as we understand it, provides the Commissioner with no real insulation from the layers of middle management review by the Department of Commerce, gives the Under Secretary the legal authority to make final decisions on granting patents and trademarks, reduces the Commissioner in status by being appointed by the Secretary instead of by the President, transfers fee-setting from the Congress to the Secretary, repeals the Consumer Price Index limitation on the size of annual fee increases, lacks a strong proposal for eliminating the problem of withholding the patent fee surcharge money, has an inadequate exemption from restrictions on the number of full-time equivalent employees that the Corporation may employ, and contains no management advisory board.

So, on balance, we think the defects in the September 6 draft are so serious that the bill would not improve the Patent and Trademark Office. We believe that H.R. 1659 is a cost-effective proposal that would improve the Patent and Trademark Office.

With regard to the Commerce Dismantling Act, we are opposed to the transfer of the Patent and Trademark Office to Department of Justice. We would support the alternative that has been mentioned of incorporating H.R. 1659 into the Department of Commerce Dismantling Act although we have no position on the Dismantling Act itself.



Mr. Chairman, thank you for the opportunity to present IPO's views.

[The prepared statement of Mr. Wamsley follows:]

PREPARED STATEMENT OF HERBERT C. WAMSLEY, EXECUTIVE DIRECTOR,  
INTELLECTUAL PROPERTY OWNERS

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before the Subcommittee today on behalf of Intellectual Property Owners (IPO), to support establishment of the U.S. Patent and Trademark Office (PTO) as a government corporation.

IPO is a trade association that represents large and small companies, universities, and individuals who own patents, trademarks, copyrights and trade secrets. IPO members are responsible for a substantial share of the research and development and patenting in the United States. In 1994, 25 organizations that are represented on our Board of Directors, only a portion of the membership of the association, invested \$20 billion in research and development. During the same year, IPO members were granted about 15,000 U.S. patents, 27 percent of all patents granted to U.S. nationals.

The patent system encourages invention and encourages investment in commercialization of new products and services. The Patent and Trademark Office, which is the cornerstone of the patent system, must operate effectively if the system is to fulfill its potential for creating jobs in U.S. industry and strengthening the national economy. The Office also is essential to the effective operation of the trademark system.

We compliment Chairman Moorhead and Representative Schroeder for introducing H.R. 1659, which establishes the Patent and Trademark Office as an independent government corporation with authority that will enable the Office to operate with improved effectiveness and efficiency. We enthusiastically endorse H.R. 1659; it will allow the Office to provide better service to the members of our association.

The other two bills that are subjects for today's hearing will not improve the Patent and Trademark Office. We oppose them in their current form.

BACKGROUND

IPO commissioned the report that was issued by the National Academy of Public Administration in 1989 entitled "Considerations in Establishing the Patent and Trademark Office as a Government Corporation." That report concluded the Office is well-suited for government corporation status. The Office has more in common with private businesses than most government agencies do. The Office is supported by user fee revenue and it must respond to demands for services that it does not control.

For many years, the members of IPO have expressed concern about the quality of patent and trademark examining work, the abilities and responsiveness of the clerical and paper processing operations of the Office, and the expense of obtaining patents. We explained in some detail the basis for these concerns during our testimony before this Subcommittee in May 1992. Although the Office has worked hard to improve its performance—and improvements have been made—we continue to believe that the flexibility offered by a government corporation will enable the Office to improve its operations substantially.

At the 1992 hearing, we testified that Congress should "reinvent the PTO by establishing it as a government corporation." IPO recommended then—and recommends today—that the Patent and Trademark Office corporation should include the following main features:

*Operating Flexibility*—broad operating flexibility similar to that enjoyed by private businesses with regard to personnel systems, employee compensation, management of contracts and office space, and ability to inject entrepreneurial spirit into its operations;

*Borrowing Authority*—authority for the Office to borrow money, subject to appropriate limits; and

*Voice for Users*—a statutory advisory committee of private sector experts to advise the head of the Patent and Trademark Office and members of Congress on the administration of the Office.

In addition, the practice of the Appropriations Committees since 1992 of withholding a portion of the patent surcharge fees paid to the Office has created a need for a fourth main feature of any PTO government corporation: Access to all patent fee revenue.

A PTO government corporation with these features will enjoy many of the advantages that a private business has over a conventional Federal government agency in responding to customers.

#### OPERATING FLEXIBILITY UNDER H.R. 1659

We support the provisions in H.R. 1659 that give the Office flexibility in employee compensation, numbers of employees hired, personnel policy, contracting, and management of office space, and the provision that makes the Office independent of the Commerce Department. H.R. 1659 amends several arcane provisions in titles 5 and 35 of the U.S. Code that govern the authority of the Commissioner of Patents and Trademarks to manage the operations of the Office. The importance of these provisions should not be underestimated. They go to the heart of government corporation authority.

*Compensation and Benefits*—By freeing the Office from the inflexible Federal government "GS" salary schedule (Sec. 103 of the bill), H.R. 1659 will allow the Commissioner to pay competitive salaries to employees with specialized training and experience, which the Office sometimes has been unable to do in the past. The Commissioner also will be able to increase the salaries of top performers faster than permitted by the GS salary schedule, and will have the option of modifying, the standard government retirement, insurance, and other benefits. By raising the salary of the Commissioner to Executive Level II from Level IV, the bill moves in the right direction, but we recommend a salary for the Commissioner equivalent to that earned by an attorney who heads the intellectual property staff of a major private company.

*Personnel Ceilings*—By exempting the Office (Sec. 103 of the bill) from government-wide ceilings on the number of employees (the full-time equivalent or "FTE" ceiling), H.R. 1659 will allow the Commissioner to hire as many employees as the Office has money to hire. When the users are paying the full cost of operating the Office, a government policy of artificially restricting the number of FTE's in the Office to fewer than the Office can afford to hire is nothing short of ludicrous, from a management point of view.

*Personnel Policy*—By freeing the Office from the rigid, seniority-based, government-wide personnel system (Sec. 103 of the bill), H.R. 1659 gives the Commissioner flexibility to design a new system that will give managers more freedom to hire and reward employees, fire nonperformers, and move people around. IPO supports H.R. 1659's modification of section 7106 of title 5 of the U.S. Code, relating to labor-management relations. Labor organizations in the PTO government corporation should not be permitted to strike, to bargain over compensation, or to bargain over the number of employees assigned to work projects or the technology, methods, or means of performing work. These limitations are necessary in order to implement more flexible working policies within a reasonable time and control costs of operations. The PTO government corporation will have a monopoly position as the only provider of patent and trademark services to the public, and as a user-fee funded agency will be insulated from the budgetary pressures that face other agencies. H.R. 1659 preserves the traditional right of Federal labor organizations to bargain over the impact and implementation of changes in the workplace.

*Contracting and Office Space*—By exempting the Office from several statutes, Section 102 of H.R. 1659 gives the Office flexibility to manage its own office space, contracts, and printing. This authority will enable the Office to save money and to procure computer equipment and other products and services more quickly and efficiently.

*Independence from Commerce Department*—By establishing the Office as an independent government corporation outside the Department of Commerce (Sec. 101 of the bill), H.R. 1659 gives the Commissioner freedom to operate the Office without obtaining approval from layers of middle managers who review decisions on behalf of the Secretary of Commerce. The Patent and Trademark Office currently pays several million dollars a year for services from the Commerce Department that are of little apparent value. Elimination of unnecessary Commerce management review will save money and speed up Patent and Trademark Office activities. Former Commissioner C. Marshall Dann expressed a view of the Commerce Department shared by several former Commissioners when he testified before a Congressional committee in 1980:

The Department of Commerce often impeded our efforts and rarely was of assistance to the Patent and Trademark Office. Because the Office is a bureau of the Department of Commerce, a great many actions could be taken only after approval by or with active participation by the Depart-

ment. At best, this involved delay, while quite often it amounted to obstruction of what we viewed as very constructive undertakings.

Many of the problems resulted simply from having additional layers of review. For example, on legislative matters, not only was it necessary to have clearance from the Office of Management and Budget before views were presented to the Congress, but it was also necessary for the Patent and Trademark Office to go to the Department of Commerce before there could be any communication to OMB. Sometimes Patent Office personnel had direct contact with OMB, though often they did not. The same thing was true on budget matters. On personnel matters requiring the approval of what during my tenure was known as the Civil Service Commission, it was invariably necessary to go first through the Personnel office of the Department of Commerce. Internal Patent and Trademark Office organization changes could be made only with approval from the Department.

Clearance with the Department did not ordinarily mean the approval of one person. Instead, in routine bureaucratic fashion, each approving person had a staff of persons reporting to him who first had to review the matter at issue. In all the paper-shuffling, there was rarely a sense of urgency.

#### ACCESS TO ALL FEE REVENUES UNDER H.R. 1659

We support the provisions in H.R. 1659 (in Sec. 202 of the bill) that give the Office the ability to use all of the patent and trademark fees that it collects from its customers. In particular, we urge prompt enactment of the provisions that eliminate authority of the Appropriations Committees of the Congress to withhold fees in the patent surcharge fund that was created by the Omnibus Budget Reconciliation Act of 1990. IPO's members consider recent actions by the Appropriations Committees withholding these funds to be outrageous.

The 1990 budget act created the surcharge fund as an accounting device to keep track of the extra fee revenues that were required by the 1990 act. In our opinion, the 1990 act never envisioned that the Appropriations Committees would withhold any surcharge money from the Office. Unfortunately, the Appropriations Committees withheld \$60 million from the Office between 1992 and 1995, despite complaints by members of the Judiciary Committees. For fiscal year 1996, the situation appears to be even more serious. Recently the Senate Appropriations subcommittee chaired by Sen. Gramm has proposed to withhold \$55 million of 1996 surcharge money, which is nearly 10 percent of the Office's proposed budget for 1996. This withholding of fees that have been paid by inventors and companies to have their patent applications examined is a tax on American innovation.

Congress must repeal the authority to withhold surcharge money, as proposed in Section 202 of H.R. 1659, and also should transfer previously withheld funds to the Office as proposed in Section 113 of H.R. 1659. Another provision in H.R. 1659 giving the Office freedom to use its own money is in Section 101 of the bill, which gives the Office an exemption from the "apportionment" controls exercised by the Office of Management and Budget under chapter 15 of title 31 of the U.S. Code. We also support this exemption. Without the authority to use its own money, the Office never will be able to operate in a manner similar to private businesses.

#### BORROWING AUTHORITY UNDER H.R. 1659

Another key feature of H.R. 1659 that we support is borrowing authority, found in Section 111 of the bill. The bill gives the Office authority to issue bonds or other debt instruments in an amount up to \$2 billion, which is about three times the Office's annual budget, to assist in financing Office activities. Private businesses borrow money routinely. Borrowing authority will help the Office operate more like a private business.

For example, borrowing authority will enable the Office to build its own buildings, if that option is determined to be more economical than leasing. Borrowing authority, coupled with the exemption elsewhere in the bill from the Federal Property and Administrative Services Act of 1949, will allow the Commissioner to make decisions on Office space without the involvement of the General Services Administration.

Borrowing authority also is needed in order to finance other large, one-time capital improvements such as automating the search files. In the past decade the Office has spent several hundred million dollars of current user fee income on search file automation that has been of benefit primarily to future users of the Office. It is unfair to tax current users of the Office to pay the costs of long-term capital improvements. Borrowed money is a better source of funding for such improvements.

Another important benefit of borrowing authority is to enable the Office to avoid short-term cash flow problems. Under the current financing system, if the Office

hires employees assuming a certain level of filings and those filings fail to materialize, the income expected from filing fees will not be available and the Office may find itself in a temporary cash flow squeeze that adversely affects long term programs. Similarly, if filings exceed estimates greatly, borrowed money may be needed for hiring extra staff until patent issue and maintenance fee income from the extra filings is received. Borrowing authority also will make it easier to change the patent fee schedule. For example, if patent filing and issue fees were lowered and maintenance fees were raised, as has been proposed from time to time, money would be needed to cover the temporary revenue shortfall. Borrowing is the best way to cope with fluctuations in fee income.

#### CONGRESSIONAL CONTROL AND PRIVATE SECTOR ADVISORY BOARD UNDER H.R. 1659

We support the features of H.R. 1659 that preserve Congressional control and oversight over the Office and insure a voice for private sector fee payers in how the Office is managed.

H.R. 1659 retains the existing authority of Congress to fix the types and amounts of the main patent and trademark fees, subject to the existing authority of the Commissioner, which is also continued, to raise fees annually by no more than the percentage that the Consumer Price Index (CPI) increases. IPO favors continuing the existing arrangement, including the CPI limitation. The CPI limitation imposes cost control discipline on the Office, which, unlike private companies, has no cost control pressures stemming from competition.

The PTO government corporation does not need to set its own fees in order to operate on a business-like basis. As noted, borrowing authority gives the Office a way to cope with fluctuations in customer demand. Changes in the levels or types of patent fees, beyond changes to adjust for inflation, should be approached cautiously. Although the Office overall must raise enough money through fees to support its operations, not all individual fees are currently set to recover the costs of performing the services for which the fees are charged, nor should they be set in that way in all cases. The proper level for patent and trademark fees is a policy issue.

The thoroughness of patent and trademark examination by the Office is determined in large part by the level of patent fees. For example, inventors and companies may spend tens of thousands of dollars or more on a patent search when a key patent is litigated in court, but the public cannot afford this level of perfection in patent searching for most cases. Fees should be changed only after considering the views of all interested parties on how changes will affect incentives for invention and investment that are provided by the patent and trademark laws.

We support the establishment of a Patent and Trademark Office Management Advisory Board proposed in Section 104 of H.R. 1659. The board will guarantee a voice for the Office's customers in how the Office should be managed. The board as proposed in H.R. 1659 will provide valuable information to the Congress through an annual report transmitted to the Committees on the Judiciary of the House and the Senate, and to the President. The Management Advisory Board will enable users of the PTO to work in partnership with the Commissioner and the Congress. PTO users represented through the board will have a strong interest in helping oversee the PTO and can be depended upon to insist on efficiency and effectiveness of Office operations.

#### THE ADMINISTRATION'S BILL

Our comments on the Administration's bill are based on the September 6, 1995 draft of the "United States Intellectual Property Organization Act of 1995." We understand that a few more changes may be made before the bill is sent to Congress.

We compliment the Administration on supporting the concept of a Patent and Trademark Office government corporation which, like the corporation proposed in Moorhead/Schroeder bill H.R. 1659, is subject to the Government Corporation Control Act (31 U.S.C. 9101). The September 6 draft contains several features in common with H.R. 1659 and some innovative features including at least one—a substantially higher level of compensation for the Commissioner—that is an improvement over the corresponding provision in H.R. 1659. We have concluded, reluctantly, however, that we are opposed to the Administration's bill. The bill contains the following major weaknesses:

(1) It leaves the Patent and Trademark Office corporation (renamed the U.S. Intellectual Property Organization) in the Department of Commerce in a structure that provides the Commissioner (renamed the Chief Executive Officer) with no insulation from the layers of middle management review in Commerce. Moreover, the Chief Executive Officer is demoted by reporting to the Secretary of Commerce through an Under Secretary for Intellectual Property and two Deputy Under Sec-

retaries, whose staffs would be supported by up to \$12 million a year in patent and trademark fees. The Under Secretary is given the official authority to grant patents and register trademarks. The Secretary is given the authority to appoint members of the Board of Patent Appeals and Interferences and the Trademark Trial and Appeal Board.

(2) The Chief Executive Officer is further reduced in status by being appointed by the Secretary of Commerce instead of by the President.

(3) Patent and trademark fee-setting authority is transferred from the Congress to the Secretary of Commerce, and the Consumer Price Index limitation on the size of annual fee increases is repealed.

(4) The bill lacks a strong proposal for preventing the House and Senate Appropriations Committees from withholding patent surcharge money from the corporation.

(5) The bill gives an inadequate exemption from restrictions on the number of full-time equivalent employees that the corporation may employ. Under the bill, the current number of employees is established as the base, and annual adjustments are permitted commensurate with changes in patent and trademark filings.

(6) The bill contains no management board or committee to give private sector users of the corporation an opportunity to advise on the management of the corporation.

(7) The bill establishes a joint labor-management committee to make recommendations to the CEO on the design and implementation of personnel, compensation, and benefits systems for the corporation. In our view, this arrangement would result in new obstacles to efficient operation and large increases in the cost of operating the corporation.

These weaknesses in the Administration's bill are so serious that the bill would not improve Patent and Trademark Office operations.

#### H.R. 1756, DEPARTMENT OF COMMERCE DISMANTLING ACT

IPO has no position on the Department of Commerce Dismantling Act except for Section 205, which is the section dealing with the Patent and Trademark Office. We oppose Section 205 because it would transfer the Patent and Trademark Office to the Department of Justice and repeal the Consumer Price Index limitation on the size of annual patent fee increases.

The Department of Justice is not an acceptable home for the Patent and Trademark Office. Historically, tension has existed between the antitrust laws administered by Justice and the patent and trademark laws. In addition, if the Office were transferred to Justice, a conflict of interest might exist between the Office's mission of granting patents and the mission of the Civil Division of Justice of defending patent suits for the government. Justice attorneys defending against patents regularly attack the validity of the patents.

We understand that Representative Chrysler, the sponsor of the Department of Commerce Dismantling Act, has indicated his willingness to have H.R. 1659 incorporated into his bill. We would support such an amendment.

#### CONCLUSION

IPO supports enactment of H.R. 1659, the PTO corporation bill sponsored by Chairman Moorhead and Rep. Schroeder. We oppose the Administration's draft PTO corporation bill dated September 6 and Section 205 of the Department of Commerce Dismantling Act.

I will be pleased to answer any questions.

Mr. MOORHEAD. Mr. Dunner.

#### STATEMENT OF DONALD R. DUNNER, CHAIR, SECTION OF INTELLECTUAL PROPERTY LAW, AMERICAN BAR ASSOCIATION

Mr. DUNNER. Mr. Chairman, I appreciate the opportunity to appear before you today on behalf of the American Bar Association and the 14,000 members of the Section of Intellectual Property Law.

To give you the bottom line first, and then filling in some of the details, we strongly favor the Moorhead/Schroeder bill, 1659. While we commend the administration for some imaginative thinking in

its administration bill, we are strongly opposed to a large number of the proposals that we heard today from Commissioner Lehman.

We take no specific position on the Chrysler bill, but have some special comments on its proposal to transfer the Patent and Trademark Office to the Department of Justice.

Along with other speakers today, and it has nothing to do with our Georgetown education, we feel that the Patent and Trademark Office is an appropriate agency to form as an independent Government Corporation. We agree also with the NAPA representatives on this score.

There are a number of concrete examples of the benefits of corporate structure for the Patent and Trademark Office. In a commendable effort to reduce the cost of government, the present administration has mandated that virtually all executive branch agencies reduce their number of employees by a more or less arbitrary percentage. The Patent and Trademark Office is included in this mandate to reduce the full-time equivalent employee levels. This is a prime example of circumstances in which the rules which make sense for typical government agencies make little or no sense for self-sustaining operations.

From the point of view of funding, the present structure of the PTO works pretty well. As the workload increases through increased applications for patents and for registration of trademarks, more employees are needed to handle the workload, but since rising applications produce more rising revenues, the process is essentially self-correcting and produces the needed additional revenue to sustain operations. The same is true if, in fact, the service needs were to decrease; less revenue, but fewer staff needed.

However, compliance with mandates for arbitrary across-the-board staff reductions presents the Patent and Trademark Office with a dilemma: reduced services, even if demand and revenue to support the demand are rising or provide the necessary services by devices such as contracting out services, almost inevitably at a higher unit cost for the services involved. This makes no sense from an efficiency and economy standpoint and no sense from the point of view of fairness to the users who finance and sustain the Patent and Trademark Office operations.

Another glaring example of unfairness to the user communities, which would be corrected by H.R. 1659 in particular, is the practice of not making available for expenditure by the Patent and Trademark Office all user fees collected by the Patent and Trademark Office. There is almost unanimity on this point. There is a feeling that it is grossly unfair to have a surcharge on the Patent and Trademark Office, to make it a self-sustaining organization, and then treat it as a "cash cow," as Mrs. Schroeder mentioned, and to deplete the funds to make it difficult for the Patent and Trademark Office to meet its obligations. It makes absolutely no sense to do that, and H.R. 1659 would correct that. Section 113(c), which we applaud, of 1659 calls for the transfer to the Patent and Trademark Office those residual and unappropriated balances remaining as of the effective date within the Patent and Trademark Office surcharge fund. We support that provision, and we also support the companion provision of your bill, section 202(b)(22), which would

prevent future withholding of surcharge fees by making them available without appropriation. We feel that is absolutely essential.

It should also be noted that one of the many benefits of H.R. 1659 would be to provide the PTO with greater flexibility in financial management, including borrowing authority such as that contained in section 11 of your bill.

Beyond the foregoing, it is the association's view that the Corporation should be headed by a CEO with considerable experience in patent and trademark law appointed for a term of years by the President, not by a department head, with the advice and consent of the Senate. The Corporation should have a board of directors or an advisory committee including members from the private sector with experience in patent and trademark law and experience across a wide range of disciplines. The CEO should be the chief spokesperson for the United States on patent and trademark matters and not have divided responsibility as suggested in the administration bill, and the corporation should have operating and financial flexibility similar to that of a private corporation.

In varying degrees of specificity, the Moorhead/Schroeder bill would satisfy these goals, would satisfy these needs, and accordingly, we strongly favor its passage.

We also have had an opportunity to review, albeit briefly, the proposed administration bill. As I said, we commend the administration for its recognition of the need for an organization with greater flexibility in budgetary, fiscal and administrative and other management matters. The administration draft bill, however, differs from H.R. 1659 in significant, material respects and it is in those respects that we cannot support that bill.

For example, it doesn't provide for an advisory board of the Corporation. It calls for the appointment of an Under Secretary of Commerce for Intellectual Property who will have direct line supervision authority over the Corporation. It also calls for the CEO to be appointed, not by the President, but by the Secretary. Fees would be set by the Secretary of Commerce. All patents would be granted and all trademarks registered, not by the CEO, but by the Under Secretary of Commerce for Intellectual Property. We strongly favor H.R. 1659 to the extent it departs from these provisions.

We support a corporate structure under which both responsibility and accountability are focused on the CEO of the Government Corporation. We also believe that in such a corporate structure a board of directors or, at a minimum, an advisory board is essential within the setting of our Nation's patent and trademark operations. Such a board is needed to provide advice and guidance to the CEO, particularly from the user community, and to provide a mechanism for the user community to have a voice in the running of the Corporation.

We believe that the Corporation should be outside of the Department of Commerce, as called for in H.R. 1659. We recognize that Government Corporations, including the one we hope the Patent and Trademark Office will become, are still part of the Government and still subject to policy direction from the President.

Although we don't support the approach, we also understand that the Congress and/or the President may decide that a Government Corporation should be subject to general policy direction, not only

from the President, but from another officer of the Government such as, perhaps, a Cabinet Secretary. However, this is not the sort of linkage proposed in the administration's draft bill. In fact, a number of the features of that bill totally depart from that concept.

Those features include (1) appointment of the CEO by the Secretary of Commerce rather than by the President with senatorial approval, and (2) the subordination of the CEO to direct line supervision of some Cabinet official, one whose subject matter responsibilities are in large part coterminous with those of the CEO.

It has been mentioned that in earlier days, when there was an Assistant Secretary of Commerce, distinct from the Commissioner of Patents, there was tremendous conflict between those two persons, leading a number of Commissioners to resign in disgust. I fear that having this sort of organization will create even greater conflicts because what is envisaged are not only an Under Secretary but two Deputy Under Secretaries who would, in turn, have supervisory authority over the CEO.

I might mention that the true nature of this CEO has been made clear by the characterization, by some supporting the administration bill, as a factory. That is what it would be. You would have a CEO who is strictly a businessperson, who really was not setting policy, who was doing nothing more than grinding out patents and trademarks. We think that would create great problems.

The provision for substantial funding of the operations of the Under Secretary, 2 percent of the PTO budget which under today's terms would be \$12 million, is just inviting mischief. In fact, not only would that money support patent and trademark operations; it would support advice and counseling and policymaking in the copyright sphere which, as you heard from Secretary Lehman, in fact, if he had that position, or whoever had that position, would be making copyright policy as well as patent and trademark policy.

Fee-setting authority to the Secretary, we submit, would invite mischief. We feel that the authority should be in Congress, as it has been in the past, with perhaps a bumper each year to reflect the increases or changes in the CPI.

Again, appointment authority of the Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences reposed in the Secretary of Commerce, we think, is inappropriate.

Mr. Chairman, for the reasons I have mentioned, we strongly urge support and enactment of the Moorhead/Schroeder bill, H.R. 1659, rather than the proposed administration bill.

In closing, I would like to mention, as I said before, we take no position on Congressman Chrysler's bill to abolish the Department of Commerce. We think, though, it would be a big mistake, if it is abolished, to move the Patent and Trademark Office into the Department of Justice. Not only does the Department of Justice have no real interest and involvement in matters paralleling those of the Patent and Trademark Office, but in the past the Department of Justice has had views antithetical to the views of the patent system. They have been at loggerheads before. We certainly think that of all the agencies that might be picked, the Department of Justice would be the wrong one.



Mr. Chairman, I thank you for the opportunity to appear here today. I am sorry to have lengthened your proceeding any longer than it needed to be, but we thank you.

[The prepared statement of Mr. Dunner follows:]

PREPARED STATEMENT OF DONALD R. DUNNER, CHAIR, SECTION OF INTELLECTUAL PROPERTY LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to present the views of the American Bar Association on the proposed restructuring of the U.S. Patent and Trademark Office in the form of a government corporation.

As early as 1980, the American Bar Association adopted a policy favoring legislation to give the Patent and Trademark Office separate agency status outside the Department of Commerce. As you no doubt recall, Mr. Chairman, it was in 1980 that the House Judiciary Committee favorably reported legislation to do just that. That bill, H.R. 6933 of the 96th Congress, contained other reforms, including the patent reexamination provisions now found in 35 U.S.C. 302-307, which are the subject of your current bill, H.R. 1732.

Congressman Jack Brooks wrote dissenting views on H.R. 6933, objecting, among other things, to the provisions of the bill giving independent status to the PTO. H.R. 6933 was sequentially referred to the Committee on Government Operations, then chaired by Mr. Brooks. In its report on H.R. 6933, the Committee on Government Operations struck that provision from the bill, and it never became law.

Since 1980, the case for greater operating independence on the part of the PTO has grown even stronger. In the 1980's, we saw a movement toward first partial, and later full, funding of the PTO through user fees. We in the ABA did not favor the elimination of all public funding for the PTO. However, it has become a reality, one that is unlikely to be reversed in the foreseeable future.

The fact that the PTO is now funded entirely by user fees is a development that argues most strongly in favor of government corporation status for the PTO, as called for in H.R. 1659, the "Patent and Trademark Office Corporation Act of 1995."

Fifty years ago, with the enactment of the Government Corporation Control Act of 1945, Congress recognized that traditional governmental control systems, including budget, personnel, financial management, and procurement systems, are not suitable for revenue producing and self-sustaining operations, such as the PTO.

In its August, 1995 report entitled "Incorporating the Patent and Trademark Office," the National Academy of Public Administration (NAPA) identified established criteria for the use of government corporate structures. The Academy is a Congressionally chartered, nonprofit, nonpartisan organization formed to assist governments at all levels to improve their efficiency and performance.

According to NAPA's analysis, corporate structure is appropriate for government programs which are predominately of a business nature, are revenue producing and self-sustaining or potentially self-sustaining, and involve a large number of transactions. These criteria are found in the Government Corporation Control Act of 1945, were articulated in President Truman's 1948 Budget Message, and were reaffirmed by the First Hoover Commission in 1949 and by NAPA's own 1981 Report on Government Corporations.

We agree with NAPA's conclusion that the PTO meets the basic tests of these criteria. In fact, the Academy's most recent report represents the third NAPA report recommending corporate status for the PTO. The earlier reports were issued in 1985 and 1989, before the PTO had become fully funded by user fees. We hope, Mr. Chairman, that the third time is the charm.

There are a number of concrete examples of the benefits of corporate structure for the PTO to be found in recent history of the Office.

In a commendable effort to reduce the costs of government, the present Administration has mandated that virtually all executive branch agencies reduce their number of employees by a certain more or less arbitrary percentage. The PTO is included in this mandate to reduce FTE's, or "full time equivalent" employment levels.

This is a prime example of circumstances in which rules which may make sense for typical government agencies make little or no sense for self-sustaining operations.

From the point of view of funding, the present structure of the PTO works pretty well. As the workload increases through increased applications for patents and for registration of trademarks—and it has risen steadily and predictably in recent years—more employees are needed to handle the workload. However, since rising applications mean rising revenues, the process is self-correcting, and produces the

needed additional revenue to sustain operations. The same would of course be true if service needs were to decrease: less revenue, but fewer staff needed.

However, compliance with mandates for arbitrary across the board staff reductions presents the PTO with the following dilemma: reduce services, even if demand and revenue to support the demand are rising, or provide the necessary services by devices such as contracting out services, almost inevitably at a higher unit cost for the services involved.

From the point of view of government efficiency and economy, this obviously makes no sense. It also makes no sense from the point of view of fairness to the users who finance and sustain the patent and trademark operations. They likely will find themselves paying the same for reduced and inferior services, or will shortly be called upon to pay even more in order to sustain the same level of services through less efficient, more costly mechanisms.

Another glaring example of unfairness to the user community which would be corrected by movement to a corporate structure such as that called for in H.R. 1659 is the practice of not making available, for expenditure by the PTO, all user fees collected by the PTO. How this "works," to use that term most loosely, is, as best we can determine, as follows: each entity of Congress (Committees and Subcommittees) which must decide on the funding of government agencies is given an overall figure or "mark," which represents the total amount which that Committee or Subcommittee may allocate among all the accounts for which it is responsible. To increase any given account, the amount must be made up by an offsetting reduction in another account within the portfolio of that Committee or Subcommittee.

The offsetting account need not be related. To use a specific example, crime fighting funds can be increased by reducing funding for patent and trademark operations.

Somewhat harder to understand, the offsetting "savings" need not take the form of reducing expenditures of traditional revenues of the United States, i.e. "taxpayer funds." In the case of PTO user fees, a portion of the total amount raised by the patent fee surcharge—money which is literally in the bank—is not "made available" for expenditure by the PTO.

Since the surcharge was first imposed in 1991, the total amount of user fees so impounded exceeds \$60 million.

It is by no means clear what has happened to this \$60 million. On the face of it, it seems that the funds are still in existence, and merely need a stroke of the legislative wand to make them reappear. I believe this viewpoint is reflected in section 113(c) of H.R. 1659, which calls for the transfer to the PTO of those residual and unappropriated balances remaining as of the effective date within the Patent and Trademark Office Surcharge Fund." Others argue that they are not, and that the funds were exhausted when they were reallocated in the appropriations process.

Another conclusion, which some urge, founded more in pragmatism than in formal analysis, is that, wherever the funds are, they are never coming back. Funds in the surcharge account, like "guests" at the roach hotel in the well known television commercial, check in, but they never check out.

Mr. Chairman, we do support the provision of your bill which calls for the recapture of these impounded funds. Whether or not recapture is politically achievable, we believe that the companion provision of your bill (section 202(b)(22)), which would prevent future withholding of surcharge fees by making them available without appropriation, is absolutely essential. A heavy demand was made on users of PTO services when they were told they would have to fully fund the Office's annual expenditures through user fees, including the funding of extremely expensive long term capital investments such as the automation systems. To follow this with an annual sequestration of several million dollars of these user fees, to be diverted to funding of other government operations, is fundamentally unfair.

On the subject of the problem of funding long term capital investments through annual budgeting funded by user fees, it should be noted that one of the many benefits of corporate status for the PTO is the greater flexibility in financial management, including borrowing authority such as that contained in new section 42(c) of title 35, as found in section 111 of H.R. 1659. Such borrowing authority would allow the Corporation to spread high cost capital expenditures, such as space acquisition and major systems improvements, over the life of the asset, a step which would more equitably distribute the financial burden on the users who will have to finance the improvements.

Earlier, I made reference to a long standing American Bar Association policy statement favoring independent status for the PTO outside the Department of Commerce. In keeping with the ABA position, we believe that the Corporation should be headed by a CEO with considerable experience in patent and trademark law, appointed for a term of years by the President, with the advice and consent of the Sen-

ate. The Corporation should have a board of directors, including members from the private sector with experience in patent and trademark law, should have a CEO who is the chief spokesperson for the United States on patent and trademark matters, and have operating and financial flexibility similar to that of a private corporation.

In varying degrees of specificity, these features are each reflected in H.R. 1659, and we favor enactment of the bill.

We have also had the opportunity to review a draft of an Administration bill, entitled the "United States Intellectual Property Organization Act," dated September 6, which we understand is in the final stages of development.

We commend the Administration for its recognition of the need for the PTO to have greater flexibility in budgetary, fiscal, administrative and other management matters. The Administration's draft bill, which would convert the PTO into a government corporation to be known as the "United States Intellectual Property Organization," contains a number of features designed to achieve this flexibility.

The draft bill does differ from the Chairman's bill, H.R. 1659, in a number of respects. For example, it does not provide for an advisory board for the Corporation, but does call for the establishment of a new Under Secretary of Commerce for Intellectual Property, who would have direct line supervision authority over the Corporation. The draft also calls for the appointment of the CEO by the Secretary of Commerce, rather than by the President. Fees would be set by the Secretary of Commerce, and all patents would be granted and all trademarks registered by the Under Secretary of Commerce for Intellectual Property.

In these respects where the two bills differ, we favor adoption of the provisions in H.R. 1659.

We support a corporate structure under which both responsibility and accountability are focused on the CEO of the government corporation. However, we also believe that in such a corporate structure, a board of directors or, at a minimum, an advisory board, is essential. Within the setting of our nation's patent and trademark operations, such a board is needed to provide advice and guidance to the CEO, particularly from the user community, and to provide a mechanism for the user community to have a voice in the running of the corporation. Such participation is absolutely essential to the success of the operation; the user community constitutes, at the same time, both the stockholders and the customer base of the Corporation.

We believe that the Corporation should be outside the Department of Commerce, as called for in H.R. 1659. We recognize that government corporations, including the one we hope the PTO will become, are still part of government, and subject to policy direction from the President. Although we do not support the approach, we also understand that the Congress and/or the President may decide that a government corporation should be subject to general policy direction not only from the President, but from another officer of the government, such as a cabinet Secretary.

However, this is not the sort of linkage proposed in the Administration's draft bill. Several features of the bill, each of which we believe is inappropriate, combine in a total structure which raises serious questions whether the intended benefits of conversion to a corporate structure could be realized.

These features are: (1) appointment of the CEO by the Secretary of Commerce, rather than by the President with Senate approval; (2) the subordination of the CEO to direct line supervision of a sub-cabinet official, one whose subject matter responsibilities are in large part coterminous with those of the CEO; (3) provision for substantial funding of the operations of the newly created Office of the Under Secretary of Commerce for Intellectual Property, with the source of that funding being a fixed share of patent and trademark user fees; (4) assignment of the authority to issue patents and register trademarks to the Under Secretary for Intellectual Property; (5) assignment of appointment authority of the Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences to the Secretary of Commerce; and (6) severe circumscription the authority of the CEO of the Corporation.

Let me say a few words about each of these features.

#### CEO APPOINTMENT

While vesting power of appointment of the CEO in the Secretary of Commerce is not the most significant defect in the Administration's draft bill, it is, we feel, a mistake. Presidential appointment, with the approval of the Senate, brings with it authority and prestige not conveyed in case of appointment by a cabinet secretary, especially where, as here, the appointment is by the head of the department to which the CEO will be reporting. This represents not only a matter of political reality, but of Constitutional dimension.

Article II, section 2 of the Constitution of the United States requires that all Officers of the United States be appointed by the President, by and with the Advice and Consent of the Senate. In its discretion, Congress may vest the power of appointment of "inferior Officers" in persons other than the President, including heads of Departments. In our view, the task of managing and directing the patent and trademark functions of the United States is not a responsibility which can appropriately be assigned to an "inferior Officer" of the United States. Indeed, it may be that the appointment authority in the draft bill avoids Constitutional infirmity only because other provisions of the bill circumscribe the duties of the CEO so severely that the term "inferior Officer" may be factually and Constitutionally appropriate.

#### SUPERVISION BY UNDER SECRETARY

The draft bill places the United States Intellectual Property Organization "under the policy direction of the Under Secretary of Commerce for Intellectual Property with respect to patents and trademarks." It makes the CEO of the Organization "subject to the direction of the Under Secretary of Commerce for Intellectual Property on patent and trademark policy matters."

We interpret these provisions as placing the Organization and its CEO under direct line supervision of the Under Secretary, and we understand this to be the intent of the Administration in drafting the bill.

As I noted earlier, while we do not favor it in the case of the PTO, we recognize that it is not uncommon to place government corporations under the general policy direction of a cabinet official. However, the draft bill goes considerably further than this, both in the source and degree of supervision.

Regardless of the statutory language used, supervision or guidance from a cabinet head is likely to be quite different than that from a subordinate officer. Factors such as breadth of responsibility, perspective, and severe time demands ordinarily dictate that cabinet secretaries do not engage in detailed supervision of operations under their guidance. Much more intrusive supervision is likely to result from the structure proposed under the Administration's bill.

Like the United States Intellectual Property Organization, the position of Under Secretary for Intellectual Property does not currently exist, but is a creature of the proposed legislation. In essence, what is being proposed is a splitting of the functions presently performed by the PTO under a single officer, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, into two operations headed by two officers. Under this structure, not only is all policy authority moving to the Under Secretary, but the CEO of the Corporation is placed under the direct supervision of the Under Secretary.

We believe that such subordination of the CEO and the Corporation would be antithetical to the degree of operational independence and authority needed for a government corporation to work effectively. We understand that the Administration bill contemplates the transfer of a number of top level, highly qualified policy staff members from the Office of the Commissioner to the Office of Under Secretary. The availability of this talent pool, the members of whom are currently active in running the operations of the PTO, will increase the likelihood of supervision which is overly detailed, counterproductive, and—from the perspective of the leadership and personnel of the Corporation—demoralizing.

#### FUNDING FOR THE UNDER SECRETARY

The manner and generosity of the funding proposed for the Under Secretary only serves to heighten our concerns regarding excessive and counterproductive supervision of the corporation.

The draft bill would fund the Office of Under Secretary from patent and trademark users fees, two percent of which are made available annually for the offices of the Under Secretary. This would give the Under Secretary an entitlement to PTO user fees in the neighborhood of \$12 million per year.

We have several concerns in this regard. One, this amount of money will finance a level of activity that goes far beyond general policy direction. Considering that the sources of the funding are patent and trademark user fees, it would not be surprising to find that the Under Secretary feels compelled to give the corporation attention and staff time commensurate with this rather large financial contribution. This could very well increase the potential for a level of involvement by the Office of the Under Secretary which is excessive and inappropriate.

We are also concerned that user fee funding for all operations of the Office of the Under Secretary once again would take us down the road of utilizing patent and trademark fees for matters other than patents and trademarks. This would be the case in that the Under Secretary's responsibilities would not be limited to patent

and trademark matters, but would extend to all other forms of intellectual property protection, most notably copyright matters, which are currently the subject of very important, labor intensive efforts by the United States government, particularly in the international arena. These efforts would, presumably, be funded with patent and trademark fees.

#### PATENTS TO BE ISSUED BY THE UNDER SECRETARY

Under the Administration's draft bill, policy matters, including the decision whether to issue individual patents and register individual trademarks, would migrate to the Under Secretary. It is particularly difficult to understand why this core function of the Patent and Trademark Office should not, in a corporate structure, be performed by the Corporation itself. As we read the draft bill, the authority of the Under Secretary is not limited to establishing policy regarding patenting, such as policy regarding patenting of a major emerging technology. The draft bill requires that each and every individual patent be issued, and each and every trademark registered, by the Under Secretary. This would split the examination process, to be carried out by the Corporation, from the decision to issue a patent or register a trademark. We find this to be impractical, unworkable, and a further denigrating and demoralizing message to the Corporation and its personnel that they are not to be trusted with governmental decision-making.

In this regard, it has been suggested to us that the Administration's bill was drafted pursuant to a principle or belief that all governmental decision-making functions must continue to be performed by a traditional government agency, in this case by officers of the Department of Commerce. If this were the case, the theory goes, the issuance of a patent or registration of a trademark, clearly governmental functions, could not be assigned to a government corporation.

If this in fact is a premise of the bill, we believe it is a false premise. Government corporations are not precluded from performing governmental functions. In a sense, the opposite is true: if such an entity performs governmental functions, it is an entity of the government, even if its enabling statute declared it not to be. *Lebron v. National Rail Passenger Corporation*. 115 S. Ct. 961 (1995).

#### LIMITED AUTHORITY OF THE CEO

Under the Administration's bill, the CEO of the proposed United States Intellectual Property Organization, in carrying out the functions assigned to the Corporation, would have considerably more flexibility than is currently enjoyed by the Commissioner. However, the functions of the CEO and the Corporation would be limited, by statute, to these specific functions: the examination of patent and trademark applications and carrying out studies specifically related to such examination or to other functions specifically assigned by statute to the Corporation.

The CEO would have no authority to issue patents or register trademarks, set fees, or appoint members of internal trial and appellate boards. H.R. 1659 contains a much preferable statement of the responsibilities of the CEO, including authority to issue patents and register trademarks, a major advisory role to the President regarding both domestic and international patent and trademark matters, as well as in regard to legislative changes in patent or trademark law. The Administration's draft bill assigns no policy advisory role to the CEO, and apparently none is intended.

In some government circles, the proposed new corporate structure for the PTO has come to be known as "the factory." Many of us in the patent and trademark user community were made uneasy by the emergence of that terminology. That uneasiness turns to anxiety as we comprehend the appropriateness of that term to describe the structure proposed in the Administration's draft bill.

In light of the foregoing, we strongly urge enactment of the Moorhead/Schroeder bill, H.R. 1659.

Finally, we take no position on H.R. 1756, Congressman Chrysler's bill to abolish the Department of Commerce, other than to note that the provisions of section 205 of the bill, which would transfer the PTO to the Department of Justice, are inconsistent with the position of the ABA that the PTO be made "separate and independent" of the Commerce Department or any other Department. Given the fact that, in the past, there have been strong tensions between the Department of Justice and the patent community, placement in the Department of Justice seems particularly inappropriate.

In this regard, we understand that Mr. Chrysler has recently endorsed the approach taken in H.R. 1659 regarding the future structure for patent and trademark operations, a move which we applaud.

Mr. MOORHEAD. We appreciate each one of you being here because your comments have been helpful.

Mr. Kirk, if the Patent and Trademark Office activities are no longer subject to review by the Department of Commerce, who should watch guard over how the Office handles hundreds of millions of dollars in fees?

Mr. KIRK. We would suggest the two mechanisms that I mentioned. One, there should be an effective advisory committee made up of users of the patent and trademark system, expert in patent and trademark matters, as well as a number of other disciplines, to oversee the operations of the Office. It would have a permanent staff; a small but permanent staff that could spend the time to really understand what was going on in the Office—to look at the numbers, to look at the operations, and to keep the advisory committee fully apprised of the health of the organization. This committee then could consult with and work with the Commissioner or chief executive officer to provide appropriate oversight.

In addition to that, of course, you would have this committee and the counterpart committee in the Senate which could conduct regular oversight hearings. And, finally, you would have annual audit reports under either of the bills, so that we think there would be sufficient oversight of the office under H.R. 1569.

Mr. MOORHEAD. If any of you have comments different from the person answering the questions, don't hesitate to comment.

If the Office became a independent agency, would it suffer from not having a Cabinet-level officer to speak in the interests of intellectual property in the White House?

Mr. DUNNER. I might comment on that.

There has been some concern on that issue. There have been views expressed that having—in fact, Commissioner Lehman expressed that view—that by having a spokesperson standing in for you would improve clout within the administration. We think, however, that having a direct line to the President, not necessarily to the President himself but to one of his designees, will continue to provide the necessary clout.

We think that there will be collaboration with the Trade Representative, there will be collaboration with the Department of State, when it is necessary, and even the Department of Commerce, if it continues to exist. We think that that is not a sufficient negative to detract from 1659 in its present form.

Mr. MOORHEAD. What level salaries do you think we should have for the qualified Commissioner? You are giving him more authority than you have before. At what level should he be?

Mr. DUNNER. Coming from private practice, I have a view. Whatever salary you pay the Commissioner, even if it is at the level in the administration bill, potentially \$300,000, you are not really going to compete with the salaries that the really top people can draw either from industry or from the legal profession. But certainly that is a commendable number.

I would say that if you are paying a CEO and Commissioner, who is making a policy decision, \$150,000 with a possibility for good performance of making \$300,000, I doubt that you will have any trouble getting the best qualified people. In the past, however, we have been able to get some very solid, good people at even lower

salaries. But I think that that higher level would assure you of reaching the top talent pool.

Mr. WAMSLEY. I agree with Mr. Dunner's comments. If a way could be found to establish a benchmark such as the salaries paid to the chief intellectual property attorneys in the largest companies, who typically manage up to a few hundred attorneys, but far fewer employees than the Patent and Trademark Office, that that would be a good guide. That certainly would be a salary substantially higher than level 1 of the Government executive schedule.

Mr. MOORHEAD. From a user's point of view, can the qualities of Patent and Trademark Office services be improved? How will Government Corporations specifically be able to improve these services?

Mr. WAMSLEY. We think the services can be improved. The Patent and Trademark Office has made major efforts to improve its services in recent years, and some improvements have been made. We continue to receive comments from our members that the quality of patent and trademark examining could be improved, and paper handling, et cetera, could be more efficient and responsive.

I think the heart of the H.R. 1659 is the management flexibility. The various kinds of flexibility provided to the Commissioner under that bill will enable streamlining, faster decisionmaking and a more efficient, more cost-effective way of providing patent and trademark processing and services.

Mr. MOORHEAD. What about the administration's proposal for a joint labor-management committee? Do you want to comment on that?

Mr. DUNNER. I will defer to Mr. Kirk, who has experience on that subject.

Mr. KIRK. I don't have a great deal of experience in that personally, based on my activities in the Patent and Trademark Office, but we have a great deal of concern about this proposal.

As you will find in my written statement, the AIPLA believes that the labor-management equation should be left exactly where it is today. Now, you can't leave it alone in the sense that when you create a Government Corporation, you do have to make changes in terms of exempting the corporation from certain aspects of title 5 of the United States Code, but then providing certain restrictions. But we believe that the balance should be exactly where it stands today. It should not be cut back, it should not be expanded.

With respect to the proposal in the administration bill, we believe that it goes far beyond the situation today, especially without an advisory committee to oversee and provide balance. We are concerned about that proposal.

Mr. MOORHEAD. Some employees are a little nervous about the power of the Commissioner to decide on a new location for the Patent and Trademark Office once it is free from paying GSA rent. Should there be board approval or some other check on such major decisions, provided the board has this advisory authority?

Mr. DUNNER. Certainly from not only the employee standpoint, but from the practitioner standpoint. I remember when the Patent and Trademark Office was in the Department of Commerce right downtown, and they were thinking of moving it as far away as

Crystal City, and we were in shock. We found that that wasn't so bad. In fact, there was a lot of input then from the private sector.

Having an advisory committee, I think, would provide absolutely essential input on that type of issue and would provide the necessary counsel, the necessary input, the necessary restraint to prevent the Commissioner from going hog wild on a matter such as that.

Mr. MOORHEAD. Mr. Dunner, you probably have some idea about this. Is it sound policy for the Patent and Trademark Office to be 100 percent self-sustaining in fees, and how will the borrowing and investing power granted under 1659 affect this situation?

Mr. DUNNER. Well, Your Honor—Mr. Moorhead—I am used to being in court; I just finished a trial and have been saying "Your Honor" more than you might imagine.

My view and the view of the association is, there was a time when we were opposed to having a self-sustaining obligation. The feeling was that innovators, inventors, made significant contributions to the Nation's well-being and economy, and the burden of paying for granting patents and related activities should be shared by the public and the inventor community.

I think we have come to live with the concept of a self-sustaining Patent Office, and I don't think you hear many people objecting to that right now. What they do object to is being charged to self-sustain a Patent and Trademark Office and then have a large chunk of the money paid for that purpose taken away for other purposes having nothing to do with our matters.

Now, if you have a Patent and Trademark Office capable as an independent Corporation of raising money through the issuance of bonds and the like, you run the risk in a potential situation of having a Commissioner of the PTO just continue to increase fees to continue to fund operations and just borrow money in order to pay for it.

Under our approach, and under 1659's approach, with Congress imposing a limit on fees and also having an advisory committee's input, I think you restrict the ability of any Commissioner to create problems in that regard. So I think with 1659 the situation is livable.

Mr. MOORHEAD. I think this has been a very interesting discussion.

Mrs. Schroeder will submit questions if she has them for the record.

We will be submitting questions from our absent members for responses.

We greatly appreciate your being here. This concludes the hearing.

Thank you very much.

Mr. DUNNER. Thank you, Mr. Chairman.

Mr. KIRK. Thank you.

Mr. MOORHEAD. The hearing is adjourned.

[Whereupon, at 12:50 p.m., the subcommittee adjourned.]



# PATENT AND TRADEMARK OFFICE GOVERNMENT CORPORATION

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FRIDAY, MARCH 8, 1996

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS AND  
INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:02 a.m., in room 2226, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, Howard Coble, and Martin R. Hoke.

Also present: Thomas E. Mooney, chief counsel; Mitch Glazier, assistant counsel; Jon Dudas, assistant counsel; Sheila F. Wood, secretary; and Betty Wheeler, minority counsel.

Mr. MOORHEAD. The Subcommittee on Courts and Intellectual Property will come to order. Today we're meeting to conduct the second and final day of hearings on legislation to transform the Patent and Trademark Office into an independent Government Corporation.

H.R. 1659, which has bipartisan support, and H.R. 2533, the administration's bill which was introduced by request, provide a new status for the PTO, one which gives prestige and independence to a growing organization which is self-funded. Importantly, these bills recognize that the employees of the PTO perform very important governmental and quasi-judicial functions, and so a balance must be reached between stability and flexibility. I believe that the Government Corporation model existing in this legislation provides this balance by establishing a new personnel management system while reaffirming that PTO employees are, indeed, Federal employees, retaining Federal retirement benefits, granting pay commensurate with ability and experience, eliminating across-the-board personnel ceilings, giving enough financial autonomy to attract and retain uniquely experienced employees, guaranteeing due process to all employees for grievances, and retaining the status quo on current union/management agreements. Importantly, oversight by the President and Congress will continue to exist as it does today.

The creation of a Government Corporation will complement ongoing efforts currently happening throughout the PTO, such as reengineering the patent and trademark examination systems and expanding the delivery in service through regional centers around the country. Flexibility needs to be granted in administrative areas such as procurement, space acquisitions, budget and finance, and

human resource management. This flexibility will cut some of the redtape inherent in being engulfed by the Commerce Department while providing the stability of maintaining Federal employee status and benefits.

Under the pending legislation, employees of the PTO would not be a part of the personnel management system of OPM and would be allowed higher pay based on individual achievement and performance. For example, under H.R. 1659, introduced by Pat Schroeder and myself, the cap on the top basic pay rate available under the present GS scale will increase from about \$95,000 to about \$123,000, with a ceiling on total pay potentially increasing to around \$148,000. When there are employee problems, a negotiated grievance procedure is maintained with a right to appeal to the EEOC. Beyond regular Government retirement, health and life benefits, the Government Corporation will be able to enhance benefits to include 401(k) programs, and increased health and life insurance.

H.R. 1659 was written with the participation of employees from the PTO. We attempted to strike an appropriate balance between union and management which would translate into better service to America's creative community by a great work force under the oversight of Congress and the President.

In 1982, I became the ranking Republican on the Intellectual Property Subcommittee and served in that capacity until last year when I became its chairman. Prior to 1982, I was a member of this subcommittee going back to the mid-1970's. In looking back on the late seventies, I remember when we found out on our own about the many problems the PTO was experiencing, through no fault of its staff, but because administration after administration, both Republican and Democrat, the Department of Commerce treated the PTO as a second class operation. Pendency was up above 36 months and climbing; research files were missing.

The shoe box filing system was still in use which was developed during the days of Thomas Jefferson. At that time these files contained over 25 million documents and there were no serious plans to computerize or modernize the office. At that time, the European Patent Office and the Japanese Patent Office were being touted as the model for the world to follow. We were outraged by what we found.

Former Congressman Tom Railsback and I drafted an amendment to the PTO's annual authorization bill, and the amendment made two big changes. First, it directed the PTO to computerize and come into the 20th century. Second, the change contained in that amendment separated the PTO from the Department of Commerce and made it an independent agency. That amendment passed the House Judiciary Committee by one vote. Its passage sent shock waves throughout the Carter administration.

The very next day after that amendment passed, the Secretary of Commerce came to Capitol Hill to visit Tom Railsback and wanted to know what the problem was. We knew that the amendment to separate the PTO would not survive because the administration was opposed to it. The chairman of the Judiciary Committee, Peter Rodino, as well as the chairman of the Government Operation Committee, Jack Brooks, were opposed.

We told the Secretary that we wanted more attention paid to the PTO. We agreed that at the very best the Commissioner of Patents and Trademarks be raised to the level of Assistant Secretary of Commerce, eliminating the middleman between the Commissioner and the Secretary. It was a modest victory, but what has happened since 1980 is that our PTO has developed into the very best Patent and Trademark Office in the world, which I am very proud of.

Some of you may remember back 3 years ago when the IRS decided to tax as income those examiners who were attending law school at night, part of which was being paid by the PTO, and made it retroactive for the previous 3 years. I offered an amendment to the annual PTO authorization requiring the PTO to indemnify those examiners. I did that because I believe it's important that the PTO employees be encouraged to continue their education and that the PTO continue to attract the very best talent this country has to offer.

Following that tax problem, I got word that the PTO was going to abolish their practice of helping examiners and trademark attorneys pay for additional education. I actually saw an announcement to that effect. I remember calling the Commissioner, Harry Manbeck, in Geneva and asking him about it. He said he was not aware of such a thing, and of course it never happened.

I'm telling you these stories to illustrate how long this subcommittee has been working for the betterment of the PTO. I would not support any legislation that would in any way damage the PTO or its staff. We are not trying to dismantle this Office, or to in any way lessen the quality of a United States issued patent.

As you know, there are people and groups who try to misuse our system and there are special interest groups who work only for themselves and could care less what happens to the PTO or its employees. We must work together to assure that the PTO remains a model for the rest of the world. And we must work together to see that the money that comes in for patent applications is used to upgrade the Patent Office and not for each administration to drain off and take for use of other purposes throughout the Federal Government. That requires efficiency, flexibility, and a great work force.

It is with these goals in mind that Mrs. Schroeder and I introduced H.R. 1659, and I'm pleased to have our witnesses here today to comment on both bills before us.

[The bill, H.R. 2533, follows:]

104TH CONGRESS  
1ST SESSION

# H. R. 2533

To amend title 35, United States Code, to establish the United States Intellectual Property Organization, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 25, 1995

Mr. MOORHEAD (both by request) (for himself and Mrs. SCHROEDER) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend title 35, United States Code, to establish the United States Intellectual Property Organization, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "United States Intellec-  
5 tual Property Organization Act of 1995".

6 **SEC. 2. FINDINGS.**

7 The Congress of the United States finds that—

8 (a) the granting of patents and the registration  
9 of trademarks by the United States have promoted

1 the useful arts, strengthened the United States econ-  
2 omy, improved interstate and international com-  
3 merce, and benefited consumers by increasing the  
4 types of products and services available to the public  
5 and by providing the public with the ability to distin-  
6 guish between competing products and services;

7 (b) the Patent and Trademark Office has per-  
8 formed the duties respecting the examination of pat-  
9 ent and trademark applications, the granting of pat-  
10 ents, and the registration of trademarks;

11 (c) the Patent and Trademark Office currently  
12 has numerous services and products that the users  
13 of those services or products generally pay to re-  
14 ceive;

15 (d) because there are a large number of trans-  
16 actions, the revenues from fees associated with the  
17 services and products defray the cost of delivering  
18 those services and products;

19 (e) because of the increasing demand for serv-  
20 ices and the changing nature of those services, the  
21 Patent and Trademark Office needs to be able to re-  
22 spond quickly to changes in demand or workload;

23 (f) for the above reasons, the Patent and  
24 Trademark Office needs flexibility in budgetary, fis-  
25 cal, and other management matters;

1 (g) a restructured organization would provide  
2 the necessary flexibility for the entity to meet its ob-  
3 ligations and ensure that the patent and trademark  
4 laws are promptly and efficiently administered; and

5 (h) the United States Intellectual Property Or-  
6 ganization should succeed to the duties of the Patent  
7 and Trademark Office respecting the examination of  
8 patent and trademark applications.

9 **TITLE I—UNITED STATES INTELLECTUAL**  
10 **PROPERTY ORGANIZATION**

11 **Subtitle A—Establishment; Powers and**  
12 **Duties; Organization and Management**

13 **SEC. 101. ESTABLISHMENT OF THE ORGANIZATION.**

14 Section 1 of title 35, United States Code, is amended  
15 to read as follows:

16 **“§ 1. Establishment**

17 **“(a) ESTABLISHMENT.—**There is hereby established  
18 a body corporate to be known as the “United States Intel-  
19 lectual Property Organization” which shall be a unique  
20 agency of the Department of Commerce and report to the  
21 Secretary of Commerce, subject to the policy direction of  
22 the Under Secretary of Commerce for Intellectual Prop-  
23 erty with respect to patents and trademarks, and which  
24 is to—

1           “(1) perform all duties respecting the examina-  
2           tion of patent applications;

3           “(2) perform all duties respecting the examina-  
4           tion of trademark applications;

5           “(3) disseminate patent and trademark infor-  
6           mation to the public; and

7           “(4) perform all other duties the responsibility  
8           for which is established by the Congress or that are  
9           necessary for the administration of the Organization.

10          “(b) OFFICES.—The United States Intellectual Prop-  
11          erty Organization shall maintain an office for the service  
12          of process in the District of Columbia or the metropolitan  
13          area thereof, and shall be deemed, for purposes of venue  
14          in civil actions, to be a resident of the District of Colum-  
15          bia. The Organization may establish offices in such other  
16          place or places as it may deem necessary or appropriate  
17          in the conduct of its business.

18          “(c) REFERENCE.—For purposes of this title, the  
19          United States Intellectual Property organization shall also  
20          be referred to as the ‘Organization’.”.

21          **SEC. 102. POWERS AND DUTIES.**

22          Section 2 of title 35, United States Code is amended  
23          to read as follows:

1 **§ 2. Power and duties**

2       “(a) The Organization, under the policy direction of  
3 the Under Secretary of Commerce for Intellectual Prop-  
4 erty with respect to patents and trademarks, shall have  
5 the powers to carry out the functions and duties that are  
6 authorized by law with respect to—

7               “(1) the examination of patent and trademark  
8 applications;

9               “(2) carrying on studies, programs, or ex-  
10 changes of items or services regarding domestic and  
11 international patent and trademark law or the ad-  
12 ministration of the Organization, or any other mat-  
13 ter included in the organic acts for which the Orga-  
14 nization is responsible; and

15               “(3) carrying on programs and studies coopera-  
16 tively with foreign patent and trademark offices and  
17 international intergovernmental organizations or au-  
18 thORIZING such programs and studies to be carried  
19 on, in connection with the examination of patent and  
20 trademark applications.

21       “(b) In order to accomplish the purposes of this Act,  
22 the Organization—

23               “(1) shall have perpetual succession unless dis-  
24 solved by Act of Congress;

25               “(2) shall adopt and use a corporate seal, which  
26 shall be judicially noticed;



1           “(3) may sue and be sued in its corporate  
2 name;

3           “(4) may indemnify the Chief Executive Officer,  
4 officers, attorneys, agents and employees of the Or-  
5 ganization for liabilities and expenses incurred with-  
6 in the scope of their employment;

7           “(5) may adopt, amend, and repeal bylaws,  
8 rules, and regulations, governing the manner in  
9 which its business will be conducted and the power  
10 granted to it by law will be exercised;

11           “(6) if it is determined by the Administrator of  
12 General Services and the Secretary of Commerce  
13 that the Organization can acquire real property  
14 more cost effectively for the Organization than the  
15 General Services Administration, may acquire, con-  
16 struct, purchase, lease, hold, manage, operate, and  
17 alter any property real, personal, or mixed, or any  
18 interest therein, as it deems necessary in the trans-  
19 action of its business, and sell, lease, grant, and dis-  
20 pose of such property, as it deems necessary to ef-  
21 fectuate the purposes of this title, for periods of time  
22 or for terms that the Organization deems necessary,  
23 without regard to the provisions of the Federal  
24 Property and Administrative Services Act of 1949  
25 (40 U.S.C. 471 et seq.), as amended, the Public

1 Buildings Act of 1959, as amended (40 U.S.C. 601  
2 et seq.), the McKinney Act (42 U.S.C. 11411-12),  
3 and section 759 of title 40 (the "Brooks Act") (40  
4 U.S.C. 759, as amended: *Provided*, That if the Ad-  
5 ministrator undertakes such activities on behalf of  
6 the Organization, the Administrator shall have the  
7 authority to charge the Organization for the actual  
8 cost of undertaking these activities, but the Adminis-  
9 trator shall exempt the Organization from paying  
10 the approximate commercial charges provided for in  
11 subsection 490(j) of title 40: *Provided further*, That  
12 the Chief Executive Officer shall develop a results-  
13 oriented acquisition and property disposal process  
14 that must include quantitative and qualitative meas-  
15 ures and standards for evaluating (1) the cost effec-  
16 tiveness of the acquisition process and (2) the extent  
17 to which the acquisition of goods and services cost  
18 effectively satisfy the needs for which the items were  
19 acquired. The process shall be consistent with the  
20 principles of impartiality and competitiveness;

21 "(7)(A) may make purchases, contracts for the  
22 construction, alteration, maintenance, or manage-  
23 ment and operation of facilities and contracts for the  
24 supplies or services, except personal services, after  
25 advertising, in such manner and at such times suffi-

1       ciently in advance of opening bids, as the Organiza-  
2       tion shall determine to be adequate to insure notice  
3       and an opportunity for competition: *Provided*, That  
4       advertising shall not be required when the Organiza-  
5       tion determines that the making of any such pur-  
6       chase or contract without advertising is necessary in  
7       the interest of furthering the purposes of this title,  
8       or that advertising is not reasonably practicable;

9           “(B) may enter into and perform such pur-  
10       chases and contracts for printing services, to include  
11       the process of composition, platemaking, presswork,  
12       silk screen processes, binding, microform, and the  
13       end items of such processes, as it deems necessary  
14       to effectuate the functions of the Organization, with-  
15       out regard to sections 501 through 517 and 1101  
16       through 1123 of title 44;

17           “(C) Notwithstanding subparagraphs (A) and  
18       (B) above, procurement procedures, including those  
19       related to advertising, shall be applied consistent  
20       with all obligations under international agreements  
21       on government procurement to which the United  
22       States is a signatory. The Organization shall issue  
23       internal guidelines, as appropriate, to ensure consist-  
24       ency with such obligations;

1           “(8) may use, with their consent, services,  
2           equipment, personnel, and facilities of other civilian  
3           or military agencies and instrumentalities of the  
4           Federal Government, on a reimbursable basis, and,  
5           on a similar basis, to cooperate with such other  
6           agencies and instrumentalities in the establishment  
7           and use of services, equipment, and facilities of the  
8           Organization;

9           “(9) may obtain from the Administrator of the  
10          General Services Administration such services as he  
11          or she is authorized to provide to agencies of the  
12          United States, on the same basis as those services  
13          are provided to other agencies of the United States;

14          “(10) may use, with the consent of the agency,  
15          government, or organization concerned, the services,  
16          records, facilities, or personnel of any State or local  
17          government agency or instrumentality or foreign  
18          government or international organization to perform  
19          necessary functions on the Organization’s behalf;

20          “(11) may enter into and perform such con-  
21          tracts, leases, cooperative agreements, or other  
22          transactions with international, foreign and domestic  
23          public agencies and private organizations and per-  
24          sons as needed in the conduct of its business and on

1 such terms as it deems appropriate, subject only to  
2 applicable laws;

3 “(12) except as otherwise provided in section  
4 10101 of the Omnibus Budget Reconciliation Act of  
5 1990, as amended (35 U.S.C. 41 note) may, as a fi-  
6 nancially self-sustaining Federal organization with-  
7 out reliance upon general taxpayer revenues, retain  
8 and utilize all of its revenues and receipts, including  
9 revenues from the sale, lease, or disposal of any  
10 property, real, personal or mixed, or any interest  
11 therein, of the Organization, including research and  
12 development and capital investment;

13 “(13) shall have the priority of the United  
14 States with respect to the payment of debts out of  
15 bankrupt, insolvent, and decedents’ estates;

16 “(14) may accept monetary gifts or donations  
17 of services, or of property, real, personal, mixed, tan-  
18 gible or intangible, in aid of any purposes herein au-  
19 thorized. The Chief Executive Officer shall establish  
20 written rules setting forth the criteria to be used in  
21 determining whether or not the acceptance of con-  
22 tributions of monetary gifts or donations or services,  
23 or of property, real, personal, mixed, tangible or in-  
24 tangible under this subsection would reflect unfavor-  
25 ably upon the ability of the Organization, or any em-

1     plovee of the Organization, to carry out its respon-  
2     sibilities of official duties in a fair and objective  
3     manner, or would compromise the integrity or the  
4     appearance of the integrity of its programs or any  
5     official involved in those programs:

6           “(15) may exercise, in accordance with its by-  
7     laws, rules and regulations, all instruments nec-  
8     essary and appropriate in the exercise of any of its  
9     powers:

10           “(16) may provide for liability insurance and  
11     insurance against any loss in connection with its  
12     property, other assets or operations either by con-  
13     tract or by self-insurance; and

14           “(17) shall pay any settlement or judgment en-  
15     tered against it or arising from the act or omission  
16     of any officer or employee of the Organization from  
17     the funds of the Organization and not from amounts  
18     available under section 1304 of title 31.”.

19 **SEC. 101. ORGANIZATION AND MANAGEMENT.**

20     Section 3 of title 35, United States Code, is amended  
21     to read as follows:

22 **“§ 3. Officers, employees, and Inspector General**

23     **“(a) OFFICERS.—**

24           **“(1) CHIEF EXECUTIVE OFFICER.—**The man-  
25     agement of the Organization shall be vested in a

1 Chief Executive Officer who shall be a citizen of the  
2 United States and who shall be appointed by the  
3 Secretary of Commerce. The Chief Executive Officer  
4 shall be a person who, by reason of professional ex-  
5 perience regarding patents or trademarks and of  
6 management experience, is especially qualified to  
7 manage the Organization. *Provided, however*, That  
8 the office of Chief Executive Officer becomes vacant  
9 or the Chief Executive Officer becomes incapacitated,  
10 the Secretary may appoint an existing officer  
11 of the Organization to act in such office until the of-  
12 fice is filled.

13 "(2) OTHER OFFICERS.—The Secretary shall  
14 appoint an officer principally responsible for the ex-  
15 amination of patent applications, who shall be the  
16 principal adviser to the Chief Executive Officer on  
17 all issues affecting the Organization's patent exam-  
18 ining operations, and an officer principally respon-  
19 sible for the examination of trademark applications,  
20 who shall be the principal adviser to the Chief Exec-  
21 utive Officer on all issues affecting the Organiza-  
22 tion's trademark examining operations.

23 "(b) DUTIES.—The Chief Executive Officer—

24 "(1) shall be responsible for the management  
25 and direction of the Organization, including the ex-

1 amination of patent and trademark applications, and  
2 may delegate these responsibilities to the officers  
3 and employees of the Organization whose perform-  
4 ance of these duties shall be subject to the Chief Ex-  
5 ecutive Officer's review;

6 "(2) shall be subject to the direction of the  
7 Under Secretary of Commerce for Intellectual Prop-  
8 erty on patent and trademark policy matters;

9 "(3) shall receive as basic compensation for a  
10 calendar year an amount not to exceed the equiva-  
11 lent of the annual rate of basic pay for level I of the  
12 Executive Schedule under section 5312 of title 5  
13 and, in addition, may receive as a bonus awarded by  
14 the Secretary, an amount up to the equivalent of the  
15 annual rate of basic pay for level I, based upon the  
16 Secretary's evaluation of the Chief Executive Offi-  
17 cer's performance—

18 "(A) as defined in an annual performance  
19 agreement between the Chief Executive Officer  
20 and the Secretary incorporating measurable  
21 goals in such specific areas as productivity,  
22 cycle times, efficiency, cost-reduction, innovative  
23 ways of delivering patent and trademark serv-  
24 ices, and customer satisfaction, as delineated in  
25 an annual performance plan, and



1           “(B) as reflected in an annual report on  
2           the results of the Organization’s performance, a  
3           copy of which shall be provided to the Office of  
4           Management and Budget and the Congress:

5           *Provided, however,* That the Secretary shall provide  
6           the Director of the Office of Management and Budget  
7           the opportunity to review, before any bonus is  
8           awarded, the annual performance standards, the  
9           level of the proposed bonus, and any information  
10          that the Secretary forwards regarding the bonus;

11          “(4) shall serve on the basis of a six-year con-  
12          tract with the Secretary, so long as performance, as  
13          set forth in the annual performance agreement, is  
14          satisfactory, and

15          “(5) shall, before taking office, take an oath to  
16          discharge faithfully the duties thereof.

17          “(c) STATUS OF OFFICERS AND EMPLOYEES.—Offi-  
18          cers and employees of the Organization shall be officers  
19          and employees of the United States as defined by sections  
20          2104 and 2105, title 5. Except as otherwise provided in  
21          this section, officers and employees of the Organization  
22          shall be subject to the provisions of title 5 relating to Fed-  
23          eral employees.

24          “(d) The Chief Executive Officer shall affix the com-  
25          pensation and number of, appoint, and direct all employ-

1 ees of the Organization that he deems necessary to effect  
2 the provisions of this title, consistent with chapter 23, title  
3 5, United States Code; such determination of number, ap-  
4 pointment, and compensation (including any awards) to  
5 be made without regard to any other of the provisions of  
6 title 5, United States Code, except that the principle of  
7 veteran's preference shall apply with regard to appoint-  
8 ment.

9       “(e) LIMIT ON COMPENSATION.—Except as otherwise  
10 provided by law, no officer or employee of the Organiza-  
11 tion other than the Chief Executive Officer shall receive  
12 basic compensation for a calendar year that exceeds the  
13 equivalent of the basic rate of pay for the Senior Executive  
14 Service ES-6 (5 U.S.C. 5382). Total compensation, in-  
15 cluding compensation based on performance (but not in-  
16 cluding benefits or contribution to retirement systems),  
17 may not exceed the equivalent of the basic rate of pay  
18 for level I of the Executive Schedule under section 5312  
19 of title 5.

20       “(f) ESTABLISHMENT OF CLASSIFICATION, APPOINT-  
21 MENT, AND COMPENSATION SYSTEMS.—Notwithstanding  
22 the provisions of title 5, United States Code, the Chief  
23 Executive Officer shall have sole and exclusive discretion:

24               “(1) over the establishment, amendment, or re-  
25       peal of any position classification system, any system

1 to determine the qualifications and procedures for  
2 appointment; any compensation and award system  
3 except gainsharing, including wages and compensa-  
4 tion based on performance, and over any supplement  
5 to contributions of the Organization to the retire-  
6 ment and benefits programs; and

7 “(2) to fix and adjust rates of pay without re-  
8 gard to the provisions of chapter 53 of title 5, Unit-  
9 ed States Code and abolish positions and layoff em-  
10 ployees without regard to the provisions of chapter  
11 35 of title 5, except that the principle of veteran’s  
12 preference shall apply in any layoff system.

13 “(g) SPECIFIC EXEMPTIONS FROM TITLE 5.—To ac-  
14 complish the above, the following provisions of title 5,  
15 United States Code, shall not apply to the Organization  
16 and its employees:

17 “(1) Chapter 31 (employment authorities) ex-  
18 cept for the provision governing nepotism (5 U.S.C.  
19 3110).

20 “(2) Chapter 33 (examination, selection, and  
21 placement); except that the provisions governing rec-  
22 ommendations of Senators or Representatives (5  
23 U.S.C. 3303), selective service registration (5 U.S.C.  
24 3328), the oath of office (5 U.S.C. 3331), and em-  
25 ployee affidavits (5 U.S.C. 3333) and the principle

1 of veteran's preference, shall apply to the Organiza-  
2 tion and its employees.

3 "(3) Chapter 35 (retention preference, restora-  
4 tion, and reemployment), except the principle of vet-  
5 eran's preference shall apply to any layoff system.

6 "(4) Chapter 43 (performance appraisal).

7 "(5) Chapter 45 (incentive awards).

8 "(6) Chapter 51 (classification).

9 "(7) Chapter 53, subchapter 3 (general pay  
10 rates).

11 "(h) APPLICATION OF TITLE 5.—The provisions of  
12 chapters 83 (Civil Service Retirement System), 84 (Fed-  
13 eral Employees Retirement System), 87 (life insurance),  
14 and 89 (health insurance) of title 5 shall apply to the offi-  
15 cers and employees of the Organization. The Organization  
16 may supplement the benefits provided under chapters 83  
17 and 84 from time to time. The Organization also may sup-  
18 plement the benefits provided under chapters 87 and 89  
19 to its officers and employees.

20 "(i) PAYMENTS FOR BENEFITS.—

21 "(1) The Organization shall make such pay-  
22 ments to the Employees' Compensation Fund as are  
23 required by section 8147 of title 5.

24 "(2) The Organization shall pay to the Civil  
25 Service Retirement and Disability Fund—

1           “(A) such employee deductions and agency  
2           contributions as are required by sections 8334,  
3           8422, and 8423 of title 5;

4           “(B) such additional agency contributions  
5           as are determined necessary by the Office of  
6           Personnel Management to pay, in combination  
7           with the sums under paragraph (1), the normal  
8           cost (determined using dynamic assumptions) of  
9           retirement benefits for the employees of the Or-  
10          ganization who are subject to subchapter III of  
11          chapter 83 of title 5; and

12          “(C) such additional amounts, not to ex-  
13          ceed two percent of the amounts under para-  
14          graphs (1) and (2), as are determined necessary  
15          by the Office of Personnel Management to pay  
16          the cost of administering retirement benefits for  
17          the Organization’s employees and retirees and  
18          their survivors (which amounts shall be avail-  
19          able to the Office as provided in section  
20          8348(a)(1)(B) of title 5).

21          “(3)(A) The Organization shall pay to the Em-  
22          ployees’ Life Insurance Fund—

23                 “(i) such employee deductions and agency  
24                 contributions as are required by sections 8707  
25                 and 8708(a) of title 5; and

1           “(ii) such amounts as are determined nec-  
2           essary by the Office of Personnel Management  
3           under subparagraph (2)(C) of this subsection to  
4           reimburse the Office for contributions under  
5           section 8708(d) of title 5.

6           “(B) The Organization shall pay to the Em-  
7           ployees Health Benefits Fund—

8           “(i) such employee payments and agency  
9           contributions as are required by section 8906  
10          (a) through (f) of title 5, and

11          “(ii) such amounts as are determined nec-  
12          essary by the Office of Personnel Management  
13          under subparagraph (2)(C) of this subsection to  
14          reimburse the Office for contributions under  
15          section 8905(g)(1) of title 5.

16          “(C) The amounts required under subpara-  
17          graphs (A)(ii) and (B)(ii) of this paragraph shall  
18          pay the Government contributions for retired em-  
19          ployees who retire from the Organization after the  
20          date of transfer, the survivors of such retired em-  
21          ployees, and survivors of employees of the Organiza-  
22          tion who die after the date of transfer, prorated to  
23          reflect the portion of the total civilian service of such  
24          employees and retired employees that was performed  
25          for the Organization after the date of transfer.

1           “(4) The Organization shall pay to the Thrift  
2 Savings Fund such employee and agency contribu-  
3 tions as are required by section 8432 of title 5.

4           “(j) JOINT LABOR-MANAGEMENT COMMITTEE.—The  
5 Organization shall establish a joint committee, which will  
6 include an equal number of members appointed by the Or-  
7 ganization and employees who are designated by its labor  
8 organizations accorded exclusive recognition under chapter  
9 71 of title 5 to assist the Chief Executive Officer by mak-  
10 ing recommendations concerning the design and imple-  
11 mentation of any position classification system, and any  
12 system to determine qualifications and procedures for em-  
13 ployment, any compensation and awards system, and con-  
14 tributions of the Organization to retirement and benefits  
15 programs.

16           “(k) RESTRICTIONS ON FTE NOT APPLICABLE.—  
17 The Organization shall not be subject to any restriction  
18 or limitation on the number of full-time equivalent Federal  
19 employees it may employ unless such restriction or limita-  
20 tion is made applicable to the Organization through an  
21 amendment to this subsection. Beginning with the first  
22 full fiscal period following enactment of this bill, the num-  
23 ber of full-time equivalent Federal employees available to  
24 the Organization shall be adjusted annually by a percent-  
25 age equivalent to the projected change as determined by

1 the Secretary of Commerce in patent and trademark appli-  
2 cation filings, respectively, for each fiscal year. The projec-  
3 tion shall be based upon a linear regression model taking  
4 into account productivity changes.

5 “(I) INSPECTOR GENERAL.—The Inspector General  
6 of the Department of Commerce shall carry out all respon-  
7 sibilities and duties required of him or her, and shall have  
8 all powers and authorities vested in him or her, by the  
9 Inspector General Act of 1978 (5 U.S.C. App. 3) as  
10 amended, with respect to the programs, operations, and  
11 activities of the Organization.”.

12 **SEC. 104. DEFINITIONS.**

13 Section 6 of title 35 of the United States Code is  
14 amended to read as follows:

15 **“§ 6. Definitions**

16 “As used in this title, the following terms have the  
17 meanings indicated:

18 “(a) The term ‘Chief Executive Officer’ means  
19 the chief executive officer of the United States Intel-  
20 lectual Property Organization.

21 “(b) The term ‘Commissioner’ means the Com-  
22 missioner of Patent and Trademarks.

23 “(c) The term ‘Department’ means the Depart-  
24 ment of Commerce.



1           “(d) The term ‘intellectual property’ shall in-  
2           clude rights in inventions; in trademarks, service  
3           marks, and commercial names and designations; in  
4           literary, artistic and scientific works; in perform-  
5           ances of performing artists, phonograms and broad-  
6           casts; in industrial designs; in trade secrets and sci-  
7           entific discoveries; in semiconductor chip layout de-  
8           signs; in geographical indications; and all other  
9           rights resulting from intellectual activity in the in-  
10          dustrial, scientific, literary, or artistic fields.

11          “(e) The term ‘organic statutes’ includes this  
12          Act and the Federal statutes that confer authority  
13          upon and refer specifically to the Office, the United  
14          States Intellectual Property Organization, the Com-  
15          missioner, or the Chief Executive Officer, including  
16          the Patent Act (35 U.S.C. 1, et seq.) and the Trade-  
17          mark Act (15 U.S.C. 1051 et seq.).

18          “(f) The term ‘Organization’ means the United  
19          States Intellectual Property Organization.

20          “(g) The terms ‘Patent and Trademark Office’  
21          and “Office” mean the Patent and Trademark Of-  
22          fice of the Department of Commerce.

23          “(h) The term ‘Secretary’ means the Secretary  
24          of Commerce.”.

1 **Subtitle B—Trademark Trial and Appeal**  
2 **Board; Board of Patent Appeals and**  
3 **Interferences; Suits By and Against the**  
4 **Organization**

5 **SEC. 105. TRADEMARK TRIAL AND APPEAL BOARD.**

6 Section 17 of the Act of July 5, 1946 (commonly  
7 called the Trademark Act of 1946), as amended, is amend-  
8 ed to read as follows:

9 “(a) **FUNCTION.**—In every case of interference, oppo-  
10 sition to registration, application to register as a lawful  
11 concurrent user, or application to cancel the registration  
12 of a mark, the Chief Executive Officer of the United  
13 States Intellectual Property Organization shall give notice  
14 to all parties and shall direct a Trademark Trial and Ap-  
15 peal Board to determine and decide the respective rights  
16 of registration.

17 “(b) **COMPOSITION.**—The Trademark Trial and Ap-  
18 peal Board shall include the Chief Executive Officer, the  
19 officer of the Organization principally responsible for the  
20 examination of trademarks, the officer of the Organization  
21 principally responsible for the examination of patents, and  
22 members competent in trademark law who are appointed  
23 by the Secretary of Commerce. Each case shall be heard  
24 by at least three members of the Board.”

1 SEC. 106. BOARD OF PATENT APPEALS AND INTER-  
2 FERENCES.

3 Section 7 of title 35, United States Code is amended  
4 to read as follows:

5 **“§ 7. Board of Patent Appeals and Interferences**

6 “(a) COMPOSITION.—There shall be in the United  
7 States Intellectual Property Organization a Board of Pat-  
8 ent Appeals and Interferences. The Chief Executive Offi-  
9 cer, the officer of the Organization principally responsible  
10 for the examination of patents, the officer of the Organiza-  
11 tion principally responsible for the examination of trade-  
12 marks, and the examiners-in-chief shall constitute the  
13 Board. The examiners-in-chief shall be appointed by the  
14 Secretary of Commerce and shall be persons of competent  
15 legal knowledge and scientific ability.

16 “(b) FUNCTION.—The Board of Patent Appeals and  
17 Interferences shall, on written appeal of an applicant, re-  
18 view adverse decisions of examiners upon applications for  
19 patents and shall determine priority and patentability of  
20 invention in interferences declared under section 135(a)  
21 of this title. Each appeal and interference shall be heard  
22 by at least three members of the Board. Only the Board  
23 of Patent Appeals and Interferences may grant  
24 rehearings.”.

1 **SEC. 107. SUITS BY AND AGAINST THE ORGANIZATION.**

2 (a) Sections 8 through 14 of this title (35 U.S.C. 8,  
3 9, 10, 11, 12, 13, and 14) are renumbered 9, 10, 11, 12,  
4 13, 14, and 15, respectively.

5 (b) The following new section is added to this title:

6 **“§ 8. Suits by and against the Organization**

7 “(a) **ACTIONS UNDER UNITED STATES LAW.**—Any  
8 civil action, suit, or proceeding to which the Organization  
9 is a party is deemed to arise under the laws of the United  
10 States. Exclusive jurisdiction over all civil actions by or  
11 against the Organization is in the Federal courts as pro-  
12 vided by law. For purposes of filing suits, the Chief Execu-  
13 tive Officer shall be the head of the agency.

14 “(b) **CONTRACT CLAIMS.**—Any action, suit, or pro-  
15 ceeding against the Organization founded upon contract  
16 shall be subject to the limitations and exclusive remedy  
17 provided in sections 1346(a)(2) and 1491 through 1509  
18 of title 28, whether or not such contract claims are cog-  
19 nizable under sections 507, 1346, 1402, 1491, 1496,  
20 1497, 1501, 1503, 2071, 2072, 2411, 2501, and 2512 of  
21 title 28. For purposes of the Contract Disputes Act of  
22 1978 (41 U.S.C. 601), the Chief Executive Officer shall  
23 be deemed to be the agency head with respect to contract  
24 claims arising with respect to the Organization.

25 “(c) **TORT CLAIMS.**—Any action, suit, or proceeding  
26 against the Organization founded upon tort shall be sub-

1 ject to the limitations and exclusive remedies provided in  
2 subsection 1346(b) and sections 2671 through 2680 of  
3 title 28, whether or not such tort claims are cognizable  
4 under section 1346(b) of title 28.

5       “(d) FEDERAL REMEDIES APPLY.—Any action, suit,  
6 or proceeding against the Organization based upon civil  
7 rights laws shall be subject to the limitations and exclusive  
8 remedies provided for other Federal Government executive  
9 agencies under 42 U.S.C. 2000e-16, 29 U.S.C. 633a, 29  
10 U.S.C. 791 et seq., and 29 U.S.C. 206(d).

11       “(e) PROHIBITION ON ATTACHMENTS, LIENS,  
12 ETC.—No attachment, garnishment, lien, or similar proc-  
13 ess, intermediate or final, in law or equity, may be issued  
14 against property of the Organization.”.

15 **SEC. 108. ANNUAL MANAGEMENT REPORT.**

16       Section 15 of title 35, United States Code, as redesign-  
17 nated by section 107 of this Act, is amended to read as  
18 follows:

19 **“§ 15. Reports to Congress**

20       “(a) ANNUAL REPORT ON MONIES AND STATIS-  
21 TICS.—The Chief Executive Officer shall report to the  
22 President and the Congress annually the monies received  
23 and expended, statistics concerning the work of the Orga-  
24 nization, and other information relating to the Organiza-  
25 tion as may be useful to the Congress or the public.

1       “(b) MANAGEMENT REPORT.—The Chief Executive  
2 Officer shall prepare and submit to the President and the  
3 Congress an annual management report as required by  
4 section 9106 of title 31.”.

5       **Subtitle C—Fees; Organization Moneys;**  
6                                   **Borrowing; Audits**

7       **SEC. 109. FEES.**

8       “(a) ESTABLISHMENT OF FEE SCHEDULE.—Section  
9 41 of title 35 of the United States Code is amended to  
10 read as follows:

11       **“§ 41. Fees**

12       “Consistent with section 553 of title 5, the Organiza-  
13 tion shall recommend a schedule to the Secretary of fees  
14 to be levied for the services rendered and products pro-  
15 vided in carrying out its activities. Any schedule of fees,  
16 or revision thereof, before it is promulgated, must be ap-  
17 proved by the Secretary.”.

18       (b) PRINCIPLES FOR DEVELOPING FEE SCHED-  
19 ULES.—In the course of the deliberations to propose modi-  
20 fications to the fee schedule, the Organization shall be  
21 guided by the following principles:

22               (1) The fees shall be fair and equitable and  
23 shall give due consideration to the objectives of the  
24 patent and trademark systems.

1           (2) Financial relief, in the form of a 50 percent  
2 reduction of the major fees for filing a patent appli-  
3 cation, and issuing and maintaining a patent, shall  
4 be provided to individual inventors and non-profit  
5 organizations. Such financial relief shall be provided  
6 to small business concerns as defined in section 3 of  
7 the Small Business Act (15 U.S.C. 632) and by reg-  
8 ulations established by the Small Business Adminis-  
9 tration.

10           (3) Fees shall be established, in the aggregate,  
11 in such a manner that all costs of operating and  
12 maintaining the Organization shall be recovered, in-  
13 cluding depreciation, capital expenditures, and pay-  
14 ments in lieu of taxes, if any, and to provide the  
15 reimbursement under section 1503c(d) of title 15,  
16 United States Code (15 U.S.C. 1503c(d)).

17           (4) Fees for the processing of trademark reg-  
18 istrations and for other services and materials relat-  
19 ed to trademarks shall be calculated based solely  
20 upon the full cost of, and capital expenditures for,  
21 such trademark operations. Furthermore, trademark  
22 revenues shall be used exclusively for the processing  
23 of trademark registrations and for other services and  
24 materials related to trademarks, including a fair  
25 share of allocated general and administrative sup-

1 port costs and the reimbursement provided under  
2 section 1503c(d) of title 15, United States Code (15  
3 U.S.C. 1503c(d)).

4 (5) Fees for the processing of patent grants  
5 and for other services and materials related to pat-  
6 ents shall be calculated based solely upon the full  
7 cost of, and capital expenditures for, such patent op-  
8 erations. Furthermore, patent revenues shall be used  
9 exclusively for the processing of patent grants and  
10 for other services and materials related to patents,  
11 including a fair share of allocated general and ad-  
12 ministrative support costs and the reimbursement  
13 provided under section 1503c(d) of title 15, United  
14 States Code (15 U.S.C. 1503c(d)).

15 (c) TRANSITION PROVISION FOR FEES.—The fee  
16 schedule promulgated by the Patent and Trademark Of-  
17 fice, which is in effect immediately prior to the enactment  
18 of this legislation, shall remain in full force and effect until  
19 such time as the Secretary of Commerce has established  
20 and promulgated a schedule of fees.

21 (d) EXEMPTION FROM SEQUESTRATION ORDERS.—  
22 Section 255(g)(1)(A) of the Balanced Budget and Emer-  
23 gency Deficit Control Act of 1985 (2 U.S.C. 905(g)(a)(A))  
24 is amended by inserting after the “Tennessee Valley Au-



1 thority fund . . .” the following, “United States Intellec-  
2 tual Property Fund”.

3 (e) CONFORMING AMENDMENTS TO OBRA.—Section  
4 10101 of the Omnibus Reconciliation Act of 1990 (35  
5 U.S.C. 41 note), as amended, is amended as follows:

6 (1) In subsection (a), by striking the phrase  
7 “by subsections (a) and (b)”.

8 (2) In subsections (b)(1)(A) and (b)(2)(A), by  
9 striking “Patent and Trademark activities in the  
10 Department of Commerce” and inserting in lieu  
11 thereof “United States Intellectual Property Organi-  
12 zation”.

13 (3) In subsections (b) and (c), by striking all  
14 other references to “Patent and Trademark Office”  
15 and substituting therefor “United States Intellectual  
16 Property Organization”.

17 (4) In subsection (e), by striking “Commis-  
18 sioner of Patents and Trademarks” and inserting in  
19 lieu thereof “Chief Executive Officer of the United  
20 States Intellectual Property Organization”.

21 (5) Notwithstanding the provisions of any other  
22 law, except insofar as such law amends this sen-  
23 tence, on October 1, 1998, the provisions of section  
24 10101, as they apply to the Organization, shall cease  
25 to apply to the revenues of the Organization.

1 (f) RECOMMEND TRADEMARK FEE SCHEDULE.—

2 Subsection 31(a) of the Act of July 5, 1946 (commonly  
3 referred to as the Trademark Act of 1946), as amended,  
4 is amended to read as follows:

5 “(a) Consistent with section 553 of title 5, the Orga-  
6 nization shall recommend to the Secretary a schedule of  
7 fees to be levied for the services rendered and products  
8 provided in carrying out its activities. Any schedule of  
9 fees, or revision therefore, before it is promulgated, must  
10 be approved by the Secretary.”.

11 (g) PCT FEES.—Section 371 of title 35, United  
12 States Code, is amended to read as follows:

13 **“§ 376. Fees required**

14 “The required payment of the international fee and  
15 the handling fee, which amounts are specified in the Regu-  
16 lations, shall be paid in United States currency. The Orga-  
17 nization shall charge national fees as provided in section  
18 41 of this title and may also charge the following fees:

19 “(a) A transmittal fee (see section 361(d)).

20 “(b) A search fee (see section 361(d)).

21 “(c) A supplemental search fee (to be paid  
22 when required).

23 “(d) A preliminary examination fee and any ad-  
24 ditional fees (see section 362(b)).

1           “(e) Such other fees as established by the Sec-  
2       retary.”.

3 **SEC. 110. ORGANIZATION MONIES.**

4       Section 42 of title 35, United States Code, is amend-  
5 ed to read as follows:

6 **“§ 42. United States Intellectual Property Organiza-**  
7                                   **tion Funding**

8       “(a) ESTABLISHMENT OF A REVOLVING FUND.—

9 There is established with the Secretary of the Treasury  
10 a revolving fund, which shall be known as the Patent and  
11 Trademark Organization Fund (the “Fund”). All fees for  
12 services performed or furnished by the Organization, will  
13 be payable to the Organization, and, except as otherwise  
14 provided in section 10101 of the Omnibus Budget Rec-  
15 onciliation Act of 1990, as amended (35 U.S.C. 41 note),  
16 fees authorized under section 31 of the Act of July 5,  
17 1946 (commonly called Trademark Act of 1946), as  
18 amended, and sections 41 and 376 of title 35, and all  
19 other revenues and monies accruing to the Organization  
20 shall be deposited in the Fund. Amounts deposited in the  
21 Fund shall be available to the Organization for obligation  
22 without further appropriation and shall remain available  
23 for obligation without time limitation. All monies in the  
24 Fund shall remain available to the Organization for obli-  
25 gation until expended.

1           “(b) AUTHORITY TO INVEST.—Upon the request of  
2 the Organization, the Secretary of the Treasury shall in-  
3 vest such portion of the Fund as is not, in the judgment  
4 of the Organization, required to meet current withdrawals.  
5 Such investments shall be in public debt securities with  
6 maturities suitable to the needs of the Fund, as deter-  
7 mined by the Organization, and bearing interest at rates  
8 determined by the Secretary of the Treasury, taking into  
9 consideration current market yields on outstanding mar-  
10 ketable obligations of the United States of comparable ma-  
11 turities. The income on such investments shall be credited  
12 to and form a part of the Fund.

13           “(c) AUTHORITY TO ISSUE OBLIGATIONS.—To assist  
14 in financing its activities, the Organization is authorized  
15 after October 1, 1998 to issue obligations, to the Secretary  
16 of the Treasury and the Secretary of the Treasury may,  
17 at his or her discretion, purchase such obligations, pro-  
18 vided that the amount of such obligations outstanding at  
19 any one time does not exceed \$2,000,000,000 and pro-  
20 vided further that expenditures (including capital invest-  
21 ment and interest on borrowing) are fully offset by the  
22 Organization’s revenues in each fiscal year. For such pur-  
23 pose, the Secretary of the Treasury is authorized to use  
24 as a public debt transaction the proceeds of the sale of  
25 any securities hereafter issued under chapter 31 of title

1 31 of the United States Code and the purposes for which  
2 securities may be issued under that chapter are extended  
3 to include such purchases. Each purchase of obligations  
4 by the Secretary of the Treasury shall be upon such terms  
5 and conditions as to yield a return at a rate not less than  
6 a rate determined by the Secretary of the Treasury, taking  
7 into consideration the current yields on outstanding mar-  
8 ketable obligations of the United States of comparable ma-  
9 turity. The Secretary of the Treasury may sell, upon such  
10 terms and conditions and at such price or prices as deter-  
11 mined by the Secretary of the Treasury, any of the obliga-  
12 tions acquired under this subsection. All purchases and  
13 sales by the Secretary of the Treasury of such obligations  
14 under this subsection shall be treated as public debt trans-  
15 actions of the United States. Funds obtained by the Orga-  
16 nization from the issuance of such obligations shall be  
17 credited to and form part of the Fund.

18 “(d) FORM OF PAYMENT.—All fees for services per-  
19 formed by or materials furnished by the United States In-  
20 tellectual Property Organization will be payable to the Or-  
21 ganization.”

22 **SEC. 111. AUDITS.**

23 Chapter 4 of part I of title 35, United States Code,  
24 is amended by adding at the end the following new section:

1 **“§ 43. Audits**

2 “The Organization shall reimburse the Inspector  
3 General for the full cost of any audit conducted by the  
4 Inspector General or an external auditor under section  
5 9105 of title 31 as determined by the Inspector General.”.

6 **Subtitle D—Transfers; Use of Organization**  
7 **Name; Transition Provisions; Technical**  
8 **and Conforming Amendments**

9 **SEC. 112. TRANSFERS.**

10 (a) **TRANSFER OF FUNCTIONS, POWERS, AND DU-**  
11 **TIES.**—Except as otherwise provided in this Act, on the  
12 effective date of this Act, there are hereby transferred to,  
13 and vested in, the United States Intellectual Property Or-  
14 ganization, all functions, powers and duties vested by law  
15 in the Secretary of Commerce or the Department of Com-  
16 merce or in officers or components in the Department  
17 with respect to the authority to examine patent and trade-  
18 mark applications, and in the Patent and Trademark Of-  
19 fice, and in the officers and components of such Office.

20 (b) **TRANSFER OF ASSETS, LIABILITIES, ETC.**—The  
21 Secretary of Commerce is authorized and directed, without  
22 need of further appropriation, to transfer to the United  
23 States Intellectual Property Organization, on the effective  
24 date of this Act, those assets, liabilities, contracts, prop-  
25 erty, records, and unexpended and unobligated balances  
26 of appropriations, authorizations, allocations and other

1 funds employed, held, used, arising from, available or to  
2 be made available to the Department of Commerce (inclu-  
3 sive of funds set aside for accounts receivable which are  
4 related to functions, powers and duties which are vested  
5 in the Organization by this Act).

6 (c) TRANSFER OF INVESTED CAPITAL.—From time  
7 to time, and at least at the close of each fiscal year, the  
8 United States Intellectual Property Organization shall pay  
9 into the Treasury as miscellaneous receipts interest on the  
10 invested capital transferred to the Organization under  
11 subsection (b) less the cumulative total of invested capital  
12 repaid to the general fund. The rate of interest shall be  
13 determined by the Secretary of the Treasury taking into  
14 consideration the average market yield on outstanding  
15 marketable obligations of the United States with remain-  
16 ing periods to maturity of approximately one year during  
17 the month preceding each fiscal year. Interest payments  
18 may be deferred, but any interest payments so deferred  
19 shall themselves bear interest.

20 **SEC. 113. USE OF ORGANIZATION NAME.**

21 Chapter 1 of part I of title 35, United States Code,  
22 is amended by adding at the end the following new section:

23 **“§ 16. Use of Organization name**

24 “No individual, association, partnership, or corpora-  
25 tion, except the Organization, shall hereafter use words

1 'United States Intellectual Property Organization,' 'Pat-  
2 ent and Trademark Office,' or any combination of such  
3 words, as the name or part thereof under which such indi-  
4 vidual or entity shall do business. Violations of the fore-  
5 going may be enjoined by any Federal court at the suit  
6 of the Organization. In any such suit, the Organization  
7 shall be entitled to statutory damages of \$1,000 for each  
8 day during which such violation continues or is repeated  
9 and, in addition, may recover actual damages flowing from  
10 such violation."

11 **SEC. 114. TRANSITION PROVISIONS.**

12 (a) CONTINUATION OF CONTRACTS, ETC.—Except as  
13 provided elsewhere in this Act, all contracts, agreements,  
14 leases and other business instruments, and licenses, per-  
15 mits and privileges that have been afforded to the Patent  
16 and Trademark Office prior to the effective date of this  
17 Act, shall continue in effect as if the United States Intel-  
18 lectual Property Organization had executed such con-  
19 tracts, agreements, leases or other business instruments  
20 which have been made in the exercise of functions which  
21 are transferred to the Organization by this Act.

22 (b) CONTINUATION OF RULES.—Until changed by  
23 the United States Intellectual Property Organization, any  
24 procedural and administrative rules applicable to particu-  
25 lar functions over which the Organization acquires juris-



1 diction on the effective date of this Act shall continue in  
2 effect with respect to such particular functions.

3 (c) CESSATION OF CERTAIN ORDERS, ETC.—Unless  
4 otherwise provided by this Act, as related to the functions  
5 vested in the United States Intellectual Property Organi-  
6 zation by this Act, all orders, determinations, rules, regu-  
7 lations, and privileges of the Department of Commerce  
8 shall cease to apply to the Organization on the effective  
9 date of this Act, except for those which the Organization  
10 determines shall continue to be applicable.

11 (d) TRANSFER NOT AFFECTING OTHER PROCEED-  
12 INGS.—Except as provided elsewhere in this Act, the  
13 transfer of functions related to and vested in the United  
14 States Intellectual Property Organization by this Act shall  
15 not affect judicial, administrative, or other proceedings  
16 which are pending at the time this Act takes effect, and  
17 such proceedings shall be continued by the Organization.

18 (e) TRANSITION PROVISIONS FOR EMPLOYEES.—

19 (1) REASSIGNMENT.—On the effective date of  
20 this Act and without a break in service, all officers  
21 and employees of the Office on the day before the  
22 effective date of this Act will become officers and  
23 employees of the Organization or will be reassigned  
24 to the Office of the Under Secretary for Intellectual  
25 Property within the Department.

1           (2) NO SEPARATIONS OR REDUCTIONS IN COM-  
2           PENSATION.—No officer or employee of the Office  
3           who becomes an officer or employee of the Organiza-  
4           tion shall, for a period of one year after the effective  
5           date of this Act, be subject to separation or to any  
6           reduction in compensation as a consequence of the  
7           establishment of the Organization.

8           (f) TRANSITION PROVISIONS FOR LABOR AGREE-  
9           MENTS.—All orders, determinations, rules, and regula-  
10          tions regarding compensation and benefits and other  
11          terms and conditions of employment in effect for the Of-  
12          fice and its officers and employees on the day before the  
13          effective date of this Act shall continue in effect with re-  
14          spect to the Organization and its officers and employees  
15          until modified, superseded, or set aside by the Organiza-  
16          tion. The collective bargaining agreements between the  
17          Patent and Trademark Office and National Treasury Em-  
18          ployees Union 243, dated March 13, 1993, the Patent and  
19          Trademark Office and the National Treasury Employees  
20          Union 245, dated July 20, 1993, and the Patent and  
21          Trademark Office and the Patent Office Professional As-  
22          sociation, dated October 6, 1986, as well as the recogni-  
23          tion of the three units, shall remain in effect until modi-  
24          fied, superseded, or set aside by the parties.

1 **SEC. 115. TECHNICAL AND CONFORMING AMENDMENTS.**

2 (a) Section 5314 of title 5, United States Code is  
3 amended by adding at the end “Under Secretary of Com-  
4 merce for Intellectual Property.”.

5 (b) Section 9101(3) of title 31, United States Code,  
6 is amended by adding at the end the following:

7 “(O) the United States Intellectual Prop-  
8 erty Organization.”.

9 (c) Section 602(d) of the Federal Property and Ad-  
10 ministrative Services Act of 1949 (40 U.S.C. 474), is  
11 amended—

12 (1) in paragraph (20) by striking “or” after the  
13 semicolon;

14 (2) in paragraph (21) by striking the period  
15 and inserting “; or”; and

16 (3) by adding at the end the following:

17 “(22) the United States Intellectual Property  
18 Organization.”.

19 (d) Title 35, United States Code is amended—

20 (1) in section 13 by striking “at the rate for  
21 each year’s issue established for this purpose in sec-  
22 tion 41(d) of this title”;

23 (2) in section 111 by striking “required by law”  
24 and inserting “established by the Chief Executive  
25 Officer”;

1           (3) in section 131 by striking the second occur-  
2           rence of "Commissioner" and inserting "Under Sec-  
3           retary for Intellectual Property";

4           (4) in the third sentence of subsection 135(2)  
5           by striking "Commissioner" and inserting "Under  
6           Secretary for Intellectual Property";

7           (5) in subsection 153—

8                   (A) by striking "Commissioner" and in-  
9                   serting "Under Secretary for Intellectual Prop-  
10                  erty"; and

11                   (B) by striking "under the seal of the Pat-  
12                  ent and Trademark Office,"

13           (6) in section 251 by striking "Commissioner"  
14           in all occurrences and insert "Under Secretary for  
15           Intellectual Property";

16           (7) in section 254 by striking the second occur-  
17           rence of "Commissioner" and inserting "Under Sec-  
18           retary for Intellectual Property";

19           (8) in section 302 by inserting "established"  
20           before the word "pursuant";

21           (9) in subsection 307(a) by striking "Commis-  
22           sioner" and inserting "Under Secretary for Intellec-  
23           tual Property";

1 (10) in section 371(c)(1) by striking “provided  
2 in section 41(a)” and inserting “established under  
3 section 41”;

4 (11) in all other occurrences by striking the  
5 words “Commissioner of Patents and Trademarks”  
6 and “Commissioner” (insofar as the word refers to  
7 the Commissioner of Patents and Trademarks) and  
8 inserting “Chief Executive Officer”; and

9 (12) by striking the words “Patent and Trade-  
10 mark Office” whenever they appear and inserting  
11 “United States Intellectual Property Organization”.

12 (e) The Act of July 5, 1946 (commonly known as  
13 the Trademark Act of 1946), as amended (chapter 22 of  
14 title 15), is amended—

15 (1) in paragraph 1(d)(1), second sentence, by  
16 striking “in the Patent and Trademark Office” and  
17 inserting “by the Under Secretary for Intellectual  
18 Property”;

19 (2) in subsection 2(d)—

20 (A) by striking “Patent and Trademark  
21 Office” and inserting “United States”; and

22 (B) in the second and third sentences by  
23 striking “Commissioner” and inserting “Under  
24 Secretary for Intellectual Property”;

25 (3) in section 7—

1 (A) in subsection (a) by striking “under  
2 the seal of the Patent and Trademark Office  
3 and shall be signed by the Commissioner” and  
4 inserting “and shall be signed by the Under  
5 Secretary for Intellectual Property”;

6 (B) in subsection (d) by striking “Commis-  
7 sioner” and inserting “Under Secretary for In-  
8 tellectual Property”;

9 (C) in subsection (e) by striking “Commis-  
10 sioner” in all occurrences and inserting “Under  
11 Secretary for Intellectual Property”;

12 (D) in subsection (g) by striking “Commis-  
13 sioner” and inserting “Under Secretary for In-  
14 tellectual Property”; and

15 (E) in subsection (h) by striking “Commis-  
16 sioner” and inserting “Under Secretary for In-  
17 tellectual Property”;

18 (4) in subsection 12(a) by striking “shall refer  
19 the application to the examiner in charge of the reg-  
20 istration of marks”;

21 (5) in section 45 by striking “The term Com-  
22 missioner means the Commissioner of Patents and  
23 Trademarks.” and inserting “The term Chief Execu-  
24 tive Officer” means the Chief Executive Officer of  
25 the United States Intellectual Property Organization

1 and the term "Under Secretary for Intellectual  
2 Property" shall mean the Under Secretary for Intel-  
3 lectual Property within the Department of Com-  
4 merce.";

5 (6) in all other occurrences by striking the  
6 words "Commissioner of Patents and Trademarks"  
7 and "Commissioner" (insofar as the word refers to  
8 the Commissioner of Patents and Trademarks) and  
9 inserting "Chief Executive Officer"; and

10 (7) by striking the words "Patent and Trade-  
11 mark Office" whenever they appear and inserting  
12 "United States Intellectual Property Organization".

13 (f) Section 500(e) of title 5, United States Code, is  
14 amended by striking "the Patent Office" and "the United  
15 States Intellectual Property Organization".

16 (g) Subsection 5102(c) of title 5, United States Code,  
17 by striking paragraph (23) and redesignating paragraphs  
18 (24) through (30) as paragraphs (23) through (29).

19 (h) Section 5316 of title 5, United States Code, is  
20 amended—

21 (1) by striking "Commissioner of Patents, De-  
22 partment of Commerce";

23 (2) by striking "Deputy Commissioner for Pat-  
24 ents";

1           (3) by striking "Assistant Commissioner for  
2 Patents"; and

3           (4) by striking "Assistant Commissioner for  
4 Trademarks".

5           (i) Subparagraph 9(p)(1)(B) of the Small Business  
6 Act (15 U.S.C. 638(p)(1)(B)) is amended by striking  
7 "Commissioner of Patents and Trademarks" and insert-  
8 ing "Under Secretary for Intellectual Property".

9           (j) Section 4 of the Act of February 14, 1903 (15  
10 U.S.C. 1511) is amended by striking "(d) Patent and  
11 Trademark Office;" and redesignating subsections (a)  
12 through (g) as paragraphs (1) through (6), respectively.

13           (k) Section 19 of the Tennessee Valley Authority Act  
14 of 1933 (16 U.S.C. 831r) is amended—

15           (1) by striking "Patent and Trademark Office"  
16 and inserting "United States Patent and Trademark  
17 Organization"; and

18           (2) by striking "Commissioner of Patents and  
19 Trademarks" and inserting "Chief Executive Officer  
20 of the United States Intellectual Property Organiza-  
21 tion".

22           (l) Subparagraph 2320(d)(1)(A)(ii) of title 18,  
23 United States Code, is amended by striking "Patent Of-  
24 fice" and inserting "United States Patent and Trademark  
25 Organization".



1 (m) Section 1526(a) of title 19, United States Code  
2 (19 U.S.C. 1526(a)) is amended by striking "Patent and  
3 Trademark Office" and inserting in lieu thereof "United  
4 States Intellectual Property Organization".

5 (n) Sections 2242(b)(2)(A) and 2412(b)(2)(D) of  
6 title 19, United States Code (19 U.S.C. 2242(b)(2)(A)  
7 and 2412(b)(2)(D)) are amended by striking "Commis-  
8 sioner of Patents and Trademarks" and inserting in lieu  
9 thereof "Under Secretary of Commerce for Intellectual  
10 Property".

11 (o) The Act of April 12, 1892 (27 Stat. 395; 20  
12 U.S.C. 20) is amended by striking "Patent Office" and  
13 inserting "United States Intellectual Property Organiza-  
14 tion".

15 (p) Subsections 505(m) and 512(o) of the Federal  
16 Food, Drug, and Cosmetic Act (21 U.S.C. 355(m) and  
17 360b(o)) are amended by striking "Patent and Trademark  
18 Office" and inserting "United States Intellectual Property  
19 Organization".

20 (q) Subsection 702(d) of the Federal Food, Drug,  
21 and Cosmetic Act (21 U.S.C. 372) is amended by striking  
22 "Commissioner of Patents" and inserting "Chief Execu-  
23 tive Officer of the United States Intellectual Property Or-  
24 ganization".

1 (r) Section 2151t-1 of title 22, United States Code  
2 (22 U.S.C. 2151t-1) is amended by striking "Patent and  
3 Trademark Office" and inserting in lieu thereof "Under  
4 Secretary of Commerce for Intellectual Property".

5 (s) Section 305a of title 25, United States Code (25  
6 U.S.C. 305a) is amended by striking "Patent and Trade-  
7 mark Office" and inserting in lieu thereof "United States  
8 Intellectual Property Organization".

9 (t) Subsection 105(e) of the Federal Alcohol Adminis-  
10 tration Act (27 U.S.C. 205(e)) is amended by striking  
11 "Patent Office" and inserting "United States Intellectual  
12 Property Organization".

13 (u) Paragraph 1295(a)(4) of title 28, United States  
14 Code, is amended—

15 (1) by striking "Patent and Trademark Office"  
16 and inserting "United States Intellectual Property  
17 Organization"; and

18 (2) striking "Commissioner of Patents and  
19 Trademarks" and inserting "Chief Executive Officer  
20 of the United States Intellectual Property Organiza-  
21 tion".

22 (v) Section 1744 of title 28, United States Code, is  
23 amended—

1 (1) by striking "Patent Office" each place it  
2 appears and inserting "United States Intellectual  
3 Property Organization";

4 (2) by striking "Commissioner of Patents" and  
5 inserting "Chief Executive Officer of the United  
6 States Intellectual Property Organization"; and

7 (3) by striking "Commissioner" and inserting  
8 "Chief Executive Officer".

9 (w) Section 1745 of title 28, United States Code, is  
10 amended by striking "Patent Office" and inserting  
11 "United States Intellectual Property Organization".

12 (x) Section 1928 of title 28, United States Code, is  
13 amended by striking "Patent Office" and inserting  
14 "United States Intellectual Property Organization".

15 (y) Section 2181 (c) and (d) of title 42, United States  
16 Code (42 U.S.C. 2181 (c) and (d)) are amended by strik-  
17 ing "Commissioner of Patents" and inserting in lieu there-  
18 of "Chief Executive Officer of the United States Intellec-  
19 tual Property Organization".

20 (z) Section 160 of the Atomic Energy Act of 1954  
21 (42 U.S.C. 2190) is amended—

22 (1) by striking "Patent Office" and inserting  
23 "United States Intellectual Property Organization";  
24 and

1 (2) by striking "Commissioner of Patents" and  
2 inserting "Chief Executive Officer".

3 (aa) Subsection 305(c) of the National Aeronautics  
4 and Space Act of 1958 (42 U.S.C. 2457(c)) is amended—

5 (1) by striking "Commissioner of Patents" and  
6 inserting "Chief Executive Officer of the United  
7 States Intellectual Property Organization"; and

8 (2) by striking "Commissioner" and inserting  
9 "Chief Executive Officer".

10 (bb) Subsection 12(a) of the Solar Heating and Cool-  
11 ing Demonstration Act of 1974 (42 U.S.C. 5510(a)) is  
12 amended by striking "Commissioner of Patent Office" and  
13 inserting "Chief Executive Officer of the United States In-  
14 tellectual Property Organization".

15 (cc) Section 1111 of title 44, United States Code, is  
16 amended by striking "Commissioner of Patents" and in-  
17 serting "Chief Executive Officer of the United States In-  
18 tellectual Property Organization".

19 (dd) Sections 1114 and 1123 of title 44, United  
20 States Code, are amended by striking "Commissioner of  
21 Patents".

22 (ee) Sections 1337 and 1338 of title 44, United  
23 States Code, and the items relating to those sections in  
24 the table of contents for chapter 13 of such title are re-  
25 pealed.

1 (ff) Subsection 10(I) of the Trading With the Enemy  
2 Act (50 U.S.C. App. 10(i)) is amended by striking “Com-  
3 missioner of Patents” and inserting “Chief Executive Offi-  
4 cer of the United States Intellectual Property Organiza-  
5 tion”.

6 (gg) Section 5 of Public Law 103–226 is amended  
7 as follows:

8 (1) In paragraph (a) by adding “and the Unit-  
9 ed States Intellectual Property Organization” follow-  
10 ing “General Accounting Office,”.

11 (2) In subsection (b), by striking paragraphs  
12 (3) through (6) and inserting the following:

13 “(3) 1,998,200 during fiscal year 1996;

14 “(4) 1,958,200 during fiscal year 1997;

15 “(5) 1,917,300 during fiscal year 1998; and

16 “(6) 1,877,400 during fiscal year 1999.”.

17 **Subtitle E—Separability; Effective Date;**  
18 **Report of the Secretary**

19 **SEC. 116. SEPARABILITY.**

20 If any provision of this Act or the application thereof  
21 to any person or circumstance is held invalid, the remain-  
22 der of this Act, and the application of such provision to  
23 other persons or circumstances shall not be affected there-  
24 by.

1 **SEC. 117. EFFECTIVE DATE.**

2 This Act shall take effect 6 months after the date  
3 of the enactment of this Act.

4 **SEC. 118. REPORT OF THE SECRETARY.**

5 Not later than five years from the effective date of  
6 this Act, the Secretary of Commerce shall provide to the  
7 President and the Congress a report on the operation and  
8 effectiveness of the provisions of this Act and the costs  
9 associated therewith. As part of the report, the Secretary  
10 shall include (a) the Secretary's recommendation as to  
11 whether the Organization should continue to exist and (b)  
12 any recommendations for legislation the Secretary deems  
13 necessary or appropriate as a result of his or her analysis  
14 of the operation and effectiveness of the Act and the costs  
15 associated therewith. The Secretary shall provide to the  
16 President and the Congress additional reports that comply  
17 with the requirements of this section every six years after  
18 the submission of the first report. The preceding sentence  
19 shall cease to be effective upon the enactment of legisla-  
20 tion to terminate the Organization or to amend this Act.

21 **TITLE II—UNDER SECRETARY FOR**  
22 **INTELLECTUAL PROPERTY**

23 **SEC. 201. UNDER SECRETARY FOR INTELLECTUAL PROP-**  
24 **ERTY.**

25 (A) **APPOINTMENT.**—There shall be within the De-  
26 partment of Commerce, an Under Secretary of Commerce

1 for Intellectual property, who shall be appointed by the  
2 President by and with the advice and consent of the Sen-  
3 ate.

4 (b) DUTIES.—The Under Secretary for Intellectual  
5 Property, under the direction of the Secretary of Com-  
6 merce, shall perform the following functions with respect  
7 to intellectual property policy:

8 (1) Grant patents and register trademarks.

9 (2) Advise the Secretary on all aspects of intel-  
10 lectual property policy, legislation, and issues, in-  
11 cluding international trade issues concerning intel-  
12 lectual property.

13 (3) Advise the Chief Executive Officer of the  
14 United States Intellectual Property Organization on  
15 patent and trademark policy as provided in section  
16 2(a) of title 35, United States Code, as amended.

17 (4) Promote in international trade the United  
18 States industries that rely on intellectual property.

19 (5) Advise the Secretary of State, the United  
20 States Trade Representative, and other appropriate  
21 department and agency heads, subject to the author-  
22 ity of the Secretary, on international intellectual  
23 property issues.

1           (6) Advise Federal agencies on ways to improve  
2 intellectual property protection in other countries  
3 through economic assistance and international trade.

4           (7) Review and coordinate all proposals by  
5 agencies to assist foreign governments and inter-  
6 national intergovernmental agencies in improving in-  
7 tellectual property protection.

8           (8) Carry on studies related to the effectiveness  
9 of intellectual property protection throughout the  
10 world.

11           (9) Advise the Secretary on programs and stud-  
12 ies which the Organization is carrying on coopera-  
13 tively, or is authorizing to be carried on, with for-  
14 eign patent and trademark offices and international  
15 intergovernmental organizations in connection with  
16 the examination of patent and trademark applica-  
17 tions.

18           (10) In coordination with the Department of  
19 State, carry on studies cooperatively with foreign in-  
20 tellectual property offices and international intergov-  
21 ernmental organizations.

22           (c) DEPUTY UNDER SECRETARIES.—The Under Sec-  
23 retary for Intellectual Property shall be assisted by two  
24 Deputy Under Secretaries of Commerce for Intellectual  
25 Property. The Deputy Under Secretaries shall be ap-



1 pointed by the Secretary of Commerce to non-career posi-  
2 tions within the Senior Executive Service and shall be  
3 compensated in accordance with the provisions of title V,  
4 United States Code. The Deputy Under Secretaries shall  
5 perform such duties and functions as the Under Secretary  
6 for Intellectual Property shall prescribe.

7 (d) FUNDING.—The offices of the Under Secretary  
8 for Intellectual Property shall be financially supported  
9 through reimbursement from the United States Intellec-  
10 tual Property Organization, in lieu of all other payments  
11 by the Organization, upon determination of requirements  
12 by the Secretary and in an amount not to exceed two (2)  
13 percent of the Organization's projected annual revenues  
14 from fees for services and goods.

[The prepared statement of Mrs. Schroeder follows:]

PREPARED STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF COLORADO

Thank you, Mr. Chairman, for scheduling this hearing to continue our consideration of two bills that would reorganize the Patent and Trademark Office (PTO) as a government corporation.

I joined you in introducing both of these bills, H.R. 1659 and H.R. 2533, so that we could have a full and careful debate about the best structure for the PTO. We are all keenly interested in protecting the user fees that are paid by PTO's customers from serving as a "cash cow" and having those fees increasingly diverted for general revenue purposes. That misuse of user fees is, as we have noted in our earlier hearings, a tax on innovation, and it is unfair to PTO customers who have every right to expect that those fees will be used to deliver services as quickly and efficiently as possible.

I also support this subcommittee's consideration of corporatizing the PTO because there are a number of ways in which the flexibility of a government corporation structure will allow the PTO to operate more effectively and efficiently. For example, exempting the PTO from the Workforce Restructuring Act, with its personnel ceilings, makes sense for an entity that is entirely funded by user fees.

Today's hearing, I hope, will allow us to really focus on another area of major concern to me, and that is the importance of having provisions in any legislation we ultimately approve that extend protections to PTO employees that are functionally equivalent to those they now enjoy by virtue of Title 5 and other statutory provisions. I believe this can be done consistent with the purposes that motivate us to seek government corporation status for the PTO, but I am not assured that the proposals before us at this point do so. So I am very interested in having a discussion with our witnesses today to see what changes we need to make to ensure that employees of the PTO have the level of protection that they deserve. The issue to pay, for example, concerns me greatly. Currently, PTO employees do not have the right to collective bargaining with respect to pay, because they are covered by the General Schedule pay rates. If we take away that coverage, what mechanism are we affording to the employees to ensure that their pay is fair?

I look forward to today's testimony, and to the opportunity to discuss these concerns with our witnesses.

Mr. MOORHEAD. Our first witness is Mr. Rohrabacher. Has he come in? Is Mr. Rohrabacher here? Oh, there you are, Dana. And I understand that Congressman Hunter is going to join you.

Mr. Rohrabacher, you're recognized for 5 minutes.

STATEMENT OF HON. DANA ROHRBACHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. ROHRBACHER. Thank you very much for this opportunity to address the subcommittee this morning on this important issue of the reorganization of Patent and Trademark Office.

I oppose both bills that are before you today. I am a great supporter of downsizing government, but not by ignoring the responsibilities given to the Federal Government by our Founding Fathers. Protecting private property rights is an inherent and fundamental job and function of the Federal Government. Intellectual property is one of our most valued American assets and among the most individual rights of our citizens.

I strongly favor the concept of privatizing certain government functions. For example, postal delivery is a function that should be totally privatized. Postal delivery is a function better served in the private sector and by a private corporation. It deals with a service, not a fundamental right of our people.

H.R. 1659, however, creates a Corporation fraught with problems and danger. There is no provision for accountability to either the Congress or anyone else for that matter. Removal of civil service

status for the employees of the PTO subjects them to internal and external pressure and influence. The permission to accept monetary gifts, donated services, and the like, invites outside influence by other nations, by large multinational corporations, and by many special interest groups that have special agendas. They would be able to bring to bear their influence on the judgment and policies of the PTO.

The ability to issue indebtedness is another issue that is kind of interesting here because, apparently, there is an ability to issue an indebtedness of up to \$2 million at any one time. I'm told that was a misprint and that it was meant to say \$2 billion, but I'm not sure. But, they can issue this indebtedness and do it from, quote, "time to time," for the purchases by the Secretary of the Treasury. But there is no definition or restriction here on that money, from what I can see, and there is no really definition of what "time to time" means. And this is really an open line of credit for the PTO and the American taxpayers, especially if we're talking about \$2 billion instead of \$2 million.

Also, we have a situation, the Commissioner, although appointed by the President with the advice and consent of the Senate, can only be removed by the President for cause, once this new restructuring takes place. It is interesting that the employees can be removed at the will of the Commissioner, and his or her appointees. By the way, the Commissioner or his or her appointees can just remove these people no matter what, and they will have no protection in terms—written into law, saying that people can be removed from the PTO just only for cause.

Mr. HOKE. Mr. Rohrabacher.

Mr. ROHRABACHER. Yes?

Mr. HOKE. It is \$2 million, not \$2 billion.

Mr. ROHRABACHER. My staff has told me that that might have been a mistake; I understand that, but that needs to be clarified.

Mr. HOKE. I'm looking at the language in the bill. If it is a mistake, it's not just a single zero that has been misplaced, but three zeros. I think that the intention is clearly \$2 million not \$2 billion.

Mr. ROHRABACHER. Fine.

The Commissioner—by the way, the Commissioner, who now serves at the pleasure of the President, can in this legislation only be removed for cause; thus, he becomes an independent player. H.R. 2533 may solve some of these problems, but not without creating more problems than it solves.

Formation in H.R. 2533, the formation of an intellectual property organization which deals only with patents and trademarks, does not deal with the rest of our intellectual property, and I believe that it is a misnomer and oversight at best in that situation. The creation of an additional layer of bureaucracy, which would be established by H.R. 2533, within an already bureaucratic Department of Commerce, really doesn't seem to be a good idea. It seems to be just adding bureaucracy by creating, and it creates this Undersecretary of Commerce for Intellectual Property, and that seems to defeat the very purpose expressed by the Vice President, who is a big supporter of this legislation, in his arguments for reinventing government.

According to the legislative language, H.R. 2533 creates a unique agency of commerce subject to the policy and direction of the Under Secretary of Intellectual Property. We already have a unique agency called the Patent and Trademark Office. If, in fact, we wish to create a truly inclusive, unique agency to deal with intellectual property, we should consider combining the Patent and Trademark Office with the Copyright Office under the Library of Congress. That's an alternative that I think would be much more positive than what we're being presented here.

The chief executive officer of this newly-formed Corporation would be appointed by the Secretary of Commerce. The current Commissioner, which is the CEO, replaces the one appointed by the President, and would be—let me just say, I realize that my time is up, but I—I'll just go right to the end, and I will submit the rest of my statement for the record.

Let me just get right to the fundamental of this. And that is, when we're talking about patents, and we're talking about people's intellectual property rights, we are talking about fundamental individual rights that are every bit as important to this country, and should be, as every other civil liberty, whether it is a right to freedom of speech, freedom of press, freedom of religion, and freedom to own one's physical property, whether it's your money or your land.

This idea of making this some sort of a quasi-independent operation that's going to oversee these fundamental rights, this isn't what our Founding Fathers had in mind, and there are some real dangers in doing this, and I outlined a few here today. If we do need some reform, there are ways to do it and keep it within the Government and make sure that these people that are making decisions that are so important to our country's future as to who owns specific new ideas and new technologies. This is done in a judicious and a very formal way, so that the Government can protect these rights rather than leave them to some organization with independence from elected officials.

Well, thank you very much, and I will submit the rest of my statement for the record.

[The prepared statement of Mr. Rohrabacher follows:]

PREPARED STATEMENT OF HON. DANA ROHRBACHER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman: Thank you for the opportunity to address the subcommittee this morning on the important issue of reorganizing the Patent and Trademark Office. I oppose both bills before you today. I am a great supporter of downsizing government, but not by ignoring the responsibilities given the federal government by our Founding Fathers in the Constitution. Protecting private property rights is an inherent governmental function. Intellectual property, one of our most valued American assets, is among these rights.

I strongly favor the concept of privatizing certain government functions. For example, postal delivery is a function which should be totally privatized. It would function better in the Private sector, as a private corporation. It deals with service, not the fundamental rights of our people.

H.R. 1659 however, creates a Corporation fraught with problems and danger.

There is no provision for accountability to either the Congress or anyone else for that matter.

The removal of civil service status for the employees of the PTO subjects them to internal and external pressure and influence.

The permission to accept monetary gifts, donated services and the like, invites the outside influence of other nations, large multinational corporations, and many spe-

cial interest groups with special agendas, to have a bearing on the judgement and policies of the PTO.

The ability to issue indebtedness of up to \$2 billion at any one time (I'm told that this an misprint, and that \$2 billion was meant), "and do it from time to time" for purchase by the Secretary of the Treasury. There is no definition or restriction of "time to time," and no accountability to anyone. This is an open line of credit for the PTO from the American taxpayer.

The Commissioner, although appointed by the President, with the advice and consent of the Senate, can only be removed by the President for cause. It is interesting that the employees of this new entity can be removed at the will of the Commissioner, and his/her appointees, without the protection of for-cause-only-removal, which they now enjoy. The Commissioner, however, who now serves at the pleasure of the President, can in this new legislation only be removed for cause.

H.R. 2533 may solve some of these problems, but not without creating more problems than it solves.

The formation of an Intellectual Property Organization which deals only with patents and trademarks and does not deal with the rest of our intellectual property is an oversight and misnomer at best.

The creation of an additional layer of bureaucracy within the already bureaucratic Department of Commerce by creating an Undersecretary of Commerce for Intellectual Property defeats the purpose expressed by the Vice President in his arguments for reinventing government.

According to the legislative language, H.R. 2533 creates a unique agency of Commerce subject to the policy direction of the Undersecretary of Intellectual Property. We already have a unique agency called the Patent and Trademark Office. If, in fact, we wish to create a truly inclusive and unique agency to deal with intellectual property, we should consider combining the Patent and Trademark Office with the Copyright Office under the Library of Congress.

The Chief Executive Officer of this newly formed corporation would be appointed by the Secretary of Commerce. The current Commissioner, which this C.E.O. replaces, is appointed by the President. To replace the Commissioner with someone appointed by the Secretary would lead me to believe that the movers of this concept obviously do not attach the same importance to the intellectual property of this country that our Founding Fathers did.

The ability given to this Chief Executive Officer to borrow \$2 billion effectively removes this \$2 billion from the Appropriations process, and removes this agency from congressional oversight. Either the inventors of this nation, or the taxpayers, will have to pay the bills for this extravagance.

In summary, the Patent Office is not a business. It makes a quasi judicial decision by granting a patent which must stand up in court. Grouping the Patent and Trademark Office with the other agencies designated to become Performance Based Organizations as a part of the Vice President's plan to reinvent government is ridiculous. You cannot compare the judicial functions of the PTO with an Animal and Plant Health Inspection Service, or the Defense Commissary Agency. Those other agencies may well meet the criteria set out by Vice President Gore in his PBO proposals. The Patent and Trademark Office does not. The PBO criteria, as set out by Mr. Gore, require an agency to separate its "factory functions" or services from its policy responsibilities. To consider the responsibilities of patent examiners in the granting of patent protection as a "factory function" is absurd.

We are risking America's ultimate asset. Patents and American intellectual property protection have been the mainspring of job generation and a strong economy. In a recent book *Patent Wars—the Battle to Own the World's Technology* the author, Fred Warshofsky, stated "Where nations once fought for control of trade routes and raw materials, they now fight for exclusive rights to ideas, innovations and inventions." If we press forward with this legislation to corporatize, we are handing these rights over to the multinationals and foreign interests.

Corporatization of the PTO would seriously compromise Congressional oversight of this essentially judicial function.

The integrity of the American patent system is essential to the nation's research and development industries. Long-term corporate research, university basic research, and military breakthrough technologies would all suffer from a weakened patent system.

You will cheapen American patents if you follow through with changing the Patent Office. If we destroy this office, we cannot put it back together. Americans are dependent upon the creative process and intellectual property protection to create jobs. We are talking about giving up our technological lead for the next 100 years. As Mark Twain said, "A country without a good patent is like a crab that moves

sideways and back ways." If we do not preserve the integrity of the patent system we will in fact be taking a giant step backwards. Thank you.

Mr. MOORHEAD. Congressman Hunter.

**STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. HUNTER. Thank you, Mr. Chairman, and Mr. Hoke, and thanks for allowing a refugee from the National Security Committee to come over and testify to you on this very important subject. You're both friends and gentlemen whom I respect greatly.

Let me just say that we are now called the National Security Committee, instead of the Armed Services Committee, because we have come to recognize that the security of this country is more than just the personnel and the arms that are borne in the various armed services. Certainly, our intellectual capability, our creativity, our innovation in this country has rewarded us not only economically, but in an international defense sense. So, what we do with our patents system is very important to national security.

I associate myself with most of the remarks made by Congressman Rohrabacher.

The problem, the basic problem, I think, is this, Mr. Chairman: The award of a patent is an award of property rights. It's an award, a validation, a recognition by Government of property rights. To delegate that to a private entity is something that I think is potentially very, very dangerous.

We live in a political city; we are political animals ourselves in this county, and this country necessarily needs a good dose of politics in certain sectors to run effectively. But in the award of property, there is no substitute for an impartial judge. A patent examiner in a very real sense is a judge. He makes a determination and goes over the factors of whether the application represents something that is new, that is nonobvious, that is fully disclosive. Further he has to make that decision in an environment that is totally devoid of politics.

And the idea that we're going to have an organization in which the examiners, these judges, can be dismissed without cause by their boss, and their boss is a guy who can and will see his door open on many occasions; where corporations and competitors to the person who is applying for a patent can come through the door and put political pressure on him to get something done, is a situation that I think is going to, in the end, dismiss fairness and integrity out of the front door, or out the back door, and is going to invite unfairness. I think that ultimately it will accrue to the detriment of America's innovators.

It was interesting to see that a lot of the small inventors do not like this. They think that these reforms are going to take away a lot of their protections. They know in the end that if they get into court with infringers, they are going to be overwhelmed by large amounts of money and large amounts of political influence. With the privatization of this process they think their rights are going to be eroded.

You know, Scoop Jackson, former chairman of the Armed Services Committee in the Senate, used to say, "In matters of foreign policy, the best politics is no politics." I think that could be ex-

tended to say, "In matters of awarding patents, the best politics is no politics."

The privatization of these judges, these examiners, is going to invite politicization of this process, and, ultimately, I think, that's going to accrue to the detriment of our economic well-being.

Thanks for letting me tag along here with Dana, and don't put me down as undecided. [Laughter.]

[The prepared statement of Mr. Hunter follows:]

PREPARED STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF CALIFORNIA

The national security of this country is entwined with our economic security and for that reason I am very concerned about the many changes now being made in the American patent system. I am particularly concerned about the effort to "corporatize" the Patent Office, though I have supported in some instances privatization of government functions.

I fully understand that patents are the secret of our job creation in the United States. Anything that infringes on our strong patent system is not in the best interest of the country.

I believe that H.R. 1659 and H.R. 2533 are cut from the same cloth. Though each bill may have a different facet they both basically set up a Performance Based Organization (PBO) which is modeled for a business enterprise and not a Patent Office.

A recent December 8, 1995 memo to the Heads of Executive Departments and Agencies from Alice Rivlin, then Director of the Office of Management and Budget clearly spells out the criteria for keeping the Patent Office within the federal government and not as a corporation or PBO.

The memo first makes the statement that each of us should understand that "the Government should perform a function only if it involves an important public purpose that Government can best serve." That describes the Patent Office. Remember, our Founding Fathers put us in this business and Thomas Jefferson was one of our first three patent examiners.

The second page of the memo, point D states that "The Federal Government should limit or focus its operations to those functions: (1) Not performed by the private sector; the answer: only the U.S. Patent Office grants patents which is a quasi-legal decision.

(2) More appropriately performed by government; the answer: Our Founding Fathers determined that we should have a patent system in the second session of the first Congress. And the works of inventor and writers were protected in the Constitution, Article I, Section 8, Clause 8.

(3) That continue to demonstrate that performance by government is in the best interests of the taxpayer; the answer: Our Founding fathers established patents as a method of generating prosperity for the country. Their decision provided economic security for the United States. Our policies cannot begin to measure up to that one decision.

(4) So necessary to the national welfare that continuation of a core capacity must be assured even though the function also may be performed by the private sector. The answer: our job creation base and technological lead for the next 100 years depends upon a strong patent system. It is the fundamental building block of our economic and national security.

I have told you what the criteria is from OMB and now I want to address H.R. 1659 and H.R. 2533.

First, the inventors are not the customers of the Patent Office. They are the owners of government.

My constituents think they own the government, and rightfully so. I don't call them customers, I wouldn't dream of it. Somewhere the Patent Office has forgotten that inventors are their constituency, just as the Labor Department or HUD has constituents.

Second, creating an Intellectual Property Organization or Performance Based Organization (PBO) does not address the basic reason for the existence of the Patent Office. That is the ability to grant high quality patents.

Third, there is no reason to hire a CEO who replaces the patent commissioner and is no longer appointed by the president but by a Secretary of Commerce. More importantly, the CEO is basically given carte blanche to hire and fire personnel and to set performance standards—and this is extremely important, given the ability to borrow money to put the Patent Office into debt. At a time when we are trying to

cut government spending we are giving the CEO authority to put the Patent Office in debt. This does not make sense.

Fourth, perhaps, the worst aspect of the bill is the removal of civil service status from the patent examiners. Without that protection the examiners are at the mercy of the CEO or any other political influence that may need a patent. It will quite frankly, put the Patent Office far down the road to peddling patents by influence.

What is the prize in trying to convert the Patent Office to a business? The United States will not win the prize, but some multinationals and foreign interests might.

You are all aware of the recent hearing in the Senate on economic espionage and how many foreign governments are actively participating in lifting American technology. Certainly the changes in the Patent Office to "corporatize" will make the economic espionage considerably easier.

In a recent book "Patent Wars: The Battle To Own the World's Technology" the author Fred Warshofsky, stated, "Where nations once fought for control of trade routes and raw materials, they now fight for exclusive rights to ideas, innovations, and inventions."

That is the real prize if we change the Patent Office access to our ideas, innovations and inventions.

We must safeguard this national treasure and the patent examiners who do such a good job for us. We need to have more congressional oversight over the Patent Office not less. We must not put our job creation ability in the hands of a CEO who regards patents as just a business.

You cannot separate the policy functions of the Patent Office from the examining process. They are not making widgets at the Patent Office, but are granting patents.

Remember, the Patent Office is a core federal function. It is not in competition with business. The PTO is the sole source of "granting and not "selling" patents. It performs a quasi judicial function. Removing patent examiners from civil service status will politicize the office. We must protect them to have an independent examining process.

Our future, and the Patent Office is an integral part of our economic and national security. Remember, the American government is one of the largest securers of patents each year. Let's have strong congressional oversight and move the Patent Office under the Library of Congress where it belongs.

Thank you.

Mr. MOORHEAD. We will not make that mistake. But you understand that this is not a private corporation. This is a Government Corporation. There is no private investment. There are no private stockholders. It is as much a part of the Federal Government as it ever was.

Mr. HUNTER. Well, when I say that, I mean in the sense of the term, Mr. Chairman, that these examiners will lose what I call the "civil service shield." They are subject to being dismissed by their boss. I have talked to people in the Patent Office who have had multinational corporations come in and attempt to influence them in this intense competition of whether someone gets a patent or not. It's a very competitive, judicial forum, and in that sense, in my estimation, it is a privatization because it removes that shield, that protection, that I think has guaranteed us a modicum of fairness and integrity in the system.

Mr. MOORHEAD. You know that there are now 22 Government Corporations, of which only 5 are now eligible to title 5 regulations. Under our bill, most of the protections that employees could get under any circumstances are placed into the bill verbatim. So, those rights to the employees are well recognized and well protected.

Mr. HUNTER. Well, I know that the employees are protected in terms of their personal employment status, but in my estimation they are judges. They are awarding property rights in a very competitive arena. If you give their boss the right to fire them without cause, Lord knows, the same—all these people who visit the Patent Office and try to hammer the patent examiners and their bosses



into changing their position in this very competitive environment, where a lot of money is on the line, those people are going to exert pressure in the same way that you and I have seen pressure, we think, unfairly exerted in this administration's Commerce Department. Where corporations come in and exert, we think, political pressure on the Department of Commerce and render what, we think, are unfair decisions for our constituents. At least I have had that happen to me on several occasions.

So, I think that that judicial function of awarding property rights is such a precious, such an important function, it must be kept pristine. I think that we have the protections that we need in the present system. And I think that this "corporatization" and the ability of the Commissioner to fire the examiners, the judges, without cause, is going to lead—the real world being what it is—to pressurized situations where unfair results come about.

Mr. MOORHEAD. Do you realize that you have already voted for most of this bill? You already voted for it because it passed the House of Representatives some time ago under the bill to abolish the Department of Commerce. This legislation—

Mr. HUNTER. Well, Mr. Chairman, let me say this: abolishing the Department of Commerce I think is a great thing, because I have seen the Department of Commerce become an arena for unfair political pressures being exerted and hurting Americans. I understand that the Patent Office is under the Department of Commerce, but to say that that should lead to what I call the privatization of a judicial function, to me doesn't make a lot of sense.

Mr. MOORHEAD. The only reason that this is moving forward is because that bill has stalled.

Mr. HUNTER. Well, Mr. Chairman, let me just say this: if I can take another look at my vote to get rid of the Department of Commerce, based on all the terrible politics that I have seen there, if in doing that I have to participate in creating another political arena, then that was on balance probably not the right vote.

Mr. ROHRBACHER. Mr. Chairman, also, one of the reasons that that bill is stalled is because there was a lot of apprehension about this particular section of the bill. I know that Congressman Chrysler and myself, and many others, were talking to people all over Capitol Hill dealing specifically with the idea of taking what is basically a government protection, a government agency that has judicial functions aimed at protecting individual rights, and turning it over to a quasi-private corporation like the Post Office.

And the PTO has to be looked at as a different type of service than the post office, and a different type of service than the Animal and Plant Health Service or the Defense Commissary Agency, which are some of the agencies that the Vice President proposes we turn into quasi-government private corporations.

Mr. HUNTER. This service awards property rights. One of the most precious, fundamental duties of government, is to recognize and award property rights. And that's why this—excuse me, Dana, for breaking in on you. You're over time anyway. [Laughter.]

Please take a very careful look at this. Mr. Chairman, please listen to some of the examiners. Bring some of them in and let them talk to you in private about the pressures, about what happens in

the real world, about what happens in the competition, and about what they see happening if this occurs. It might give—

Mr. MOORHEAD. There's not many people in our area of the patent department we haven't listened to many times over the years.

Mr. HUNTER. OK.

Mr. MOORHEAD. I recognize the gentleman from Ohio. Do you have any questions?

Mr. HOKE. I have no questions.

Mr. MOORHEAD. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. HUNTER. We like your tie.

Mr. COBLE. Thank you, my friend. That was given to me by my girlfriend for Christmas, Mr. Hunter.

Mr. Hunter, you said that you appreciated our—you tagged along with Dana. You have never tagged along with anybody. [Laughter.]

It's good to have you here.

Mr. Chairman, I think you touched on it. H.R. 2517, which has passed the House, retains civil service protection, it seems to me. I think you touched on that. Patent examiners, in my opinion—I'll qualify that, in my opinion—will have civil service-like protection because the PTO, it seems to me, is going to have no choice but to implement the goals of civil service protection internally. Now, have I presented—does anybody want to refute the validity of that conclusion? If so, I'll be glad for you to do it.

Mr. ROHRABACHER. Well, what would force them to do that?

Mr. COBLE. Pardon?

Mr. ROHRABACHER. What would mandate that they do that?

Mr. COBLE. H.R. 2517, I think.

Mr. ROHRABACHER. Well, once they are independent, it is my understanding, and my staff's understanding of reading this and studying this, that these employees, there is no requirement that when they be dismissed they be dismissed for cause.

One of the benefits of taking a government service and privatizing it is that you have more management decisionmaking over your employees, as it is not being part of the Government. Now that's fine when it comes to services that, quote, "don't count," that could be done in the private sector. But if you give the private employer or manager that type of leverage with someone who is making decisions over fundamental rights of our people, that's not a good thing. And why privatize it if they're going to have the same—if employees are going to have the same rights anyway? The statement for privatizing is just the opposite.

Mr. MOORHEAD. Well, it's not privatizing.

Mr. ROHRABACHER. Well, it's—you're "corporatizing." I mean it's—you're taking it one step removed from the oversight that we now have.

Mr. HUNTER. Mr. Coble, let me put it another way. What if you had a judge, a judicial situation, where a judge could now be fired without cause by his boss. Whether you called him an administrator of judges or an overseer, or whatever, and that administrator of judges could have anybody walk in his door on an ex parte basis—that means without the other side—any company come in with great political connections, including the connections that appointed him, and tell him that they want to have a particular re-

sult in a patent application, either one that they are applying for to get approved or one that a competitor's applying for to deny it. And that person could entertain those political pressures, had the ability to fire without cause those judges. You'd say that that is an outrageous situation.

The impartiality of that judge is crucial to our system. He is awarding property rights. He is recognizing property rights and putting the Government seal of approval. "You own that piece of land, Mrs. Jones. You own this, Mr. Smith." To have such a situation would be one that would be intolerable.

This is, in my estimation, the same thing. An award of intellectual property is just as precious as the award of—and just as important and should be just as pristine as possible—as the award of real property or other types of property.

Mr. COBLE. Mr. Chairman, I realize that time is of top premium here this morning. That's not a good example, Duncan, because I am a long-time outspoken advocate of getting rid of lifetime appointment of Federal judges. So, as a matter of personal—I'm opposed to it.

Mr. HUNTER. But at least you vote them out if they don't have a lifetime appointment. I presume that what you do is what we do with a lot of judges, and that's put them up for a general election where thousands of people vote on their—

Mr. MOORHEAD. Not Federal judges.

Mr. HUNTER. No, but I'm saying where you have voting on judges. I'm all for having votes on judges. But that's where you have a community and a judgeship of 50,000 people where the housewife next door and the businessman and everybody get to make their judgment on whether that judge is impartial. That's a lot different from having an XYZ Corp. walk in the back door of your boss' office after you have donated money to him and to his campaign and to his friends, and you have a lot of economic considerations at stake and say, "This patent examiner of yours is giving us bad time."

You give him a few points that are substantive points, but the real point is a political point, and that guy in that back room has a right to come out and say, "You know something, Mr. Patent Examiner, you're a little bit slow. Why don't you approve this one and let's move on and get with the program here." That's what I'm talking about.

Mr. COBLE. I'm going to wrap this up. I started—

Mr. HUNTER. And I still like your tie.

Mr. COBLE. I started stirring this stew. I didn't realize it would get this bogged down. I just wanted that on the table, Duncan, for you and Dana to at least chew on. And don't mistake what I said as advocating that we keep wide the doors open over at Commerce. I think that these are two different—I'm not protecting Commerce at all in this. But I wanted that to be on the table. It's on the table.

Thank you all for being with us. Thank you, Mr. Chairman.

Mr. HUNTER. It's always a pleasure to be before two such wise and good friends.

Mr. MOORHEAD. Thank you both for coming this morning.

Our first witness on the next panel is Mr. Timothy Reardon. Mr. Reardon examines patent applications for the biotechnology group

for the Patent and Trademark Office. He also volunteers his time with the legislative committee for the Patent Trademark Office Society to inform the society of the many important patent and trademark legislative initiatives pending before the Congress. He is a trained biotechnic chemical engineer and holds a master's degree from the University of Rochester.

Welcome, Mr. Reardon.

Our second witness is Mr. Robert M. Tobias. Mr. Tobias is the national president for the National Treasury Employees Union, NTEU. He has served since 1983 as the chief officer and spokesperson for the Nation's largest, independent Federal sector union. A 27-year veteran of NTEU, Mr. Tobias was NTEU executive vice president and general counsel immediately prior to his election as national president.

Welcome, Mr. Tobias.

Our third witness is Mr. Ronald Stern. Since 1982, Mr. Stern has been the president of the Patent Office of Professional Association, a union representing patent examiners. From 1977 to 1982, he was vice president and general counsel for the union. He has a B.S. in physics from the City College of New York and a J.D. from George Washington University. Mr. Stern has been a primary patent examiner since 1984.

Welcome, Mr. Stern.

Our last witness on this—our next-to-the-last witness on the first panel is Mr. Howard Friedman. Since 1995, Mr. Friedman has been the president of the Trademark Society National Treasury Employees, Chapter 245. The Trademark Society is the labor union that represents the attorneys and the trademark operation of the Patent and Trademark Office. Mr. Friedman is responsible for examining trademark applications, signing letters to approve trademark applications for publication and registration.

Welcome, Mr. Friedman.

Our final witness on this panel is Ms. Catherine Simmons-Gill, president of the International Trademark Association and general counsel to General Media International, Inc. Ms. Simmons-Gill has also held positions as chief trademark counsel with Stearling Windsor, Inc., partner of the law firm of Schaeffer, Rosenwein & Fleming, and senior counsel of Sears Roebuck & Co. She holds bachelor's degrees at the University of Illinois at Chicago, and she has a law degree from Northwestern University.

Welcome back, Ms. Simmons-Gill.

We will start with Mr. Reardon.

#### STATEMENT OF TIMOTHY REARDON, CONGRESSIONAL LIAISON, PATENT AND TRADEMARK OFFICE SOCIETY

Mr. REARDON. Mr. Chairman, the Patent and Trademark Office Society is honored to testify before you this morning. Our society is a voluntary, professional organization that currently has over 2,000 members including PTO professionals, judges, former commissioners and intellectual property attorneys. The society proudly counts among its membership the managers and union members. But the society is neither a PTO management organization nor a union. The mission of our society is to foster the improvement and appreciation of U.S. patent and trademark systems and to encour-

age professionalism on the part of our members and the intellectual property community.

Excuse me, Mr. Chairman. Do I have 10 minutes, is that right? Do I have 10 minutes to speak?

Mr. MOORHEAD. Yes.

Mr. REARDON. The Patent and Trademark Office Society advocates that any reorganization of the Patent and Trademark Office should emphasize and enhance professionalism of the patent and trademark examining process. This professionalism must guard the interest of the inventor, the trademark owner, and of the American people. Our society recognizes that the purpose of these deliberations is to enable PTO management to manage more effectively and become more nimble in responding to the needs in the patent and trademark community. A government agency, to be successful, must have the capability to be ever evolving and responding to the needs of the community it serves.

The PTO does need to change, and it needs the flexibility to change. At the same time, however, our society is concerned about the impact that corporatization of the PTO would have upon the intellectual property system. Professionalism of this system should protect the interests of the American people while the PTO improves the timeliness and quality of its service.

Consequently, our society urges that the following factors be taken into account when considering options for reorganizing the PTO: equipping management with the flexibility to hire and maintain highly qualified, professional work force; providing daily operation independence from the Department of Commerce while assigning policy matters either to the Secretary of Commerce or another trade related Cabinet level officer; increasing management flexibility while ensuring accountabilities for the patent and trademark community and the American people; and fostering impartial, quasi-judicial decisionmaking while preserving job security for patent and trademark professionals.

Certainly, some would say that the present structure of the PTO prudently restrains the Commissioner of the Patent and Trademarks from implementing negative change. Still, no matter how dedicated the Commissioner is to the importance of intellectual property, no matter how skilled he may be in managing a 5,000-employee agency, no matter how progressive he is in bringing modern tools and management to the operation of the PTO, he is constrained by the present structure from implementing the positive change needed to process the growing number of applications.

One such constraint is full-time employee ceiling. Our society agrees with the provisions in these bills that the PTO not be limited in the hiring of employees to process the increasing volume of applications.

Another constraint is the burdensome procedure for acquisition of office space needed by these employees.

A third constraint is the procedure for acquisition of modern equipment vital for enabling these employees to serve the patent and trademark community.

Ultimately, not enough PTO revenue is available for hiring employees and acquiring office space and modern equipment since a portion of PTO revenue is removed for other governmental func-

tions. Only if the PTO has proper resources can productivity and quality goals be attained and backlogs of unprocessed applications be eliminated. Therefore, the PTO must be relieved of these and other constraints that hamper swift, quality service. An effective means for removing service hampering constraints may be to establishing the PTO as a Government Corporation with direct authority to retain its revenues, hire as needed and acquire office space and modern equipment. Indeed, when the Congress enacted the Government Corporation Control Act of 1945, it recognized that budgetary and other control systems designed for traditional agencies were unsuitable for the revenue producing and self-sustaining enterprises such as is the PTO.

One of the issues of corporatization is the PTO relationship with the Department of Commerce. Currently, the Secretary of Congress is empowered to vest in PTO functions and officials of the Department of Commerce. Thus, the PTO is subject to outside operational control which limits operating flexibility and effectiveness. Our society proposes independence from DOC operational control. A way of achieving this is to give to the PTO direct statutory powers as a corporation. Even so, full independence of the PTO from a Cabinet member would not facilitate the alliance of patent and trademark policy with broader economic and trade policies. This alliance is crucial because intellectual property is a cornerstone in growth industries and a central component of U.S. competitiveness.

Properly crafted, a corporate charter could reduce problems associated with outside operational control by placing the Corporation under the policy direction of the Secretary of Commerce or under another trade related Cabinet member while empowering the Commissioner to conduct all aspects of daily operation.

If the PTO is to be corporatized, our society finds a need for more accountability than is set forth in either of these bills. Increased accountability could be achieved through a board of directors stronger than the advisory board of H.R. 1659. The purpose of a board of directors in a traditional corporation is to represent and protect the interests of shareholders. In our view, the American people are, in essence, the shareholders of the patent and trademark system, and the purpose of a board of directors in a patent and trademark corporation would be to protect and represent the American people. The board of directors, if structured correctly, could represent the American people and still allow management the flexibility it needs. The board of directors we propose would not make PTO rules, rather the board would possess a mechanism by which to curb fundamentally inappropriate action.

Another benefit of this board of directors would be to provide needed continuity and experience to the PTO when a newly appointed Commissioner takes office. This continuity would be preserved by having board members serve nonconcurrent terms.

Regarding proposed exemptions to title 5 of the Civil Service Rules, our society has three points to make. First, PTO employees must have job security because they make legal decisions in a quasi-judicial capacity. Outside influences should not be able to disturb these decisions by affecting job security. As an example, an overly zealous property attorney could threaten to complain to management. Employees should have confidence in existing job se-

curity to stand behind an unpopular, but correctly rendered decision. Please do not inadvertently sacrifice the professionalism of the process for the sake of efficiency. When the professionalism of the patent and trademark system is sacrificed, the only winners would be litigators.

Our second point of title 5 involves exclusion in H.R. 1659 and in H.R. 2533 of the G.S. pay schedules. By excluding the G.S. pay schedules, the bills would provide flexibility to set wages. High wages could be offered to ensure that the Corporation would attract and retain qualified people. Exclusion of the G.S. pay schedules, however, could also eliminate assured periodic pay raises and promotions which could demoralize employees and harm professionalism. Our society suggests that the committee weigh these competing factors carefully. These concerns involving the compensation system could be addressed by setting the G.S. schedule as a base level while allowing the patent and trademark corporation to supplement this base compensation.

And our final point regarding title 5, while including the current protections of title 5 under the proposed legislation is desirable to protect professionalism, the rule which imposes the protections can be burdensome. Even so, if professionalism through job security cannot be safeguarded without title 5 intact, then neither of these bills should exclude any chapters in title 5.

To conclude, any reorganization of the Patent and Trademark Office should emphasize and enhance the professionalism of the patent and trademark examining process, provide operational independence from outside agencies while assigning policy to a Cabinet level officer, ensure accountability to the American people by creation of a board of directors, and maintain professionalism by preserving employee job security.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Reardon follows:]

PREPARED STATEMENT OF TIMOTHY REARDON, CONGRESSIONAL LIAISON, PATENT AND TRADEMARK OFFICE SOCIETY

Mr. Chairman and Members of the Subcommittee, The Patent and Trademark Office Society (PTOS) is honored to have the opportunity to provide this testimony to the Subcommittee on Courts and Intellectual Property on the proposed corporatization of the Patent and Trademark Office (PTO). We hope that this testimony will give the members of the Subcommittee the PTOS perspective of the working professionals at the PTO, and assist you in deciding the future of the Patent and Trademark Office.

The Patent and Trademark Office Society has been in existence since 1917. The PTOS is a voluntary, professional organization independent of PTO management and PTO unions. As an independent organization, we emphasize—we are neither a union nor a part of the PTO management. The PTOS membership includes Judges, former Commissioners of the Patent and Trademark Office, PTO management, patent attorneys, patent agents, patent examiners, trademark attorneys, other PTO personnel, and other intellectual property related persons. We currently have over 2000 members.

The mission of the PTOS is to foster the improvement and appreciation of the United States Patent and Trademark Systems and to encourage professionalism on the part of its members and of the intellectual property community as a whole. By our definition, "professionalism" is that which dutifully labors to administer to the interests of the inventor, the trademark owner, and the public.

The PTOS upholds its mission by encouraging professionalism through publication of the Journal of the Patent and Trademark Office Society, a scholarly journal containing articles submitted by practitioners in the field of intellectual property. The Journal is distributed to all PTOS members, and thereby encourages an exchange

of ideas in the fields of patents, trademarks and copyrights by providing a forum for the discussion of legal and technical subjects in these fields. The PTOS also upholds its mission by supporting activities within the intellectual property community, such as co-hosting the opening of the National Inventor's Hall of Fame this past year.

The PTOS' interest in testifying is to focus attention on the need to emphasize and enhance the professionalism of the trademark and patent examining process when considering options for reorganizing the PTO. This professionalism must guard the interests of the inventor, the trademark owner, and the American public.

#### I. THE NEED FOR CHANGE AND THE NEED TO KEEP WHAT WORKS

Certainly, some would say the Commissioner of Patents and Trademarks is limited by the present structure from implementing negative change. That may be true. Also true is the observation that the Commissioner—no matter how dedicated to the importance of intellectual property in our society, no matter how skilled in managing a five thousand employee agency, no matter how progressive in bringing modern tools and management techniques to the operation of the PTO—is limited by the present structure of the institution from implementing positive change.

The PTO cannot reach its full potential under the constraints of the present system. These constraints inhibit the ability of the Office to meet growing demands for processing applications. One constraint is the lengthy and burdensome procedure for acquisition of office space to house new employees hired to process the increasing volume of applications. Another constraint is the procedure for acquisition of modern resources and equipment vital for serving the patent and trademark community and the American public. Productivity and quality goals are achieved by giving employees the proper tools.

Expensive delays encountered in acquiring property and equipment through the Government Services Administration (GSA) make it difficult to provide the necessary space and resources to PTO working professionals, and contributes to a backlog of unprocessed applications. A large backlog of unprocessed applications in the PTO ultimately leads to dissatisfaction in the patent and trademark process. This backlog becomes more significant under the new General Agreement on Tariffs and Trade (GATT) guidelines, which sets the patent term to extend 20 years from the date of filing. Furthermore, a portion of PTO collected user fees which are essential to the acquisition of property and the technological advancement of the PTO are removed for other government functions.

Therefore, the PTO must be relieved of the constraints of the present system that hamper speedy, quality service. When Congress enacted the Government Corporation Control Act (GCCA) in 1945, it recognized that budgetary and other control systems designed for traditional agencies were unsuitable for revenue producing and self-sustaining enterprises, such as the PTO. In enacting the legislation, Congress emphasized its intent to provide accountability and oversight without interfering with the required operating flexibility of the corporations affected.

#### II. THE PTO IS A TWO HUNDRED YEAR OLD INSTITUTION

While some believe the reasons for these deliberations are limited to allowing the PTO to use its own funds and to be free from federal full time employee (FTE) ceilings, the PTOS recognizes that the actual purpose is to enable PTO management to manage more effectively and become more nimble in responding to the needs of the patent and trademark community. A business, to be successful, must have the capability to be ever-evolving in responding to the needs of the community it serves.

At the same time, however, we the PTOS are naturally concerned about change to this 200 year old institution. This is not to say that we are against change, rather we are concerned about the impact that corporatization of the PTO will have on the overall intellectual property system. The intellectual property system involves the interaction of trademark owners, inventors, Patent and Trademark Office employees and patent and trademark practitioners. Most importantly, the intellectual property system includes and affects the public, for it is they who benefit most prominently from its success and integrity. The PTO does need to change, and it needs the flexibility to change. Without question, the PTO must improve the timeliness and quality of service to the intellectual property community while still protecting the American public.

As proposed in H.R. 1659, the government corporation should not be subject to FTE ceilings since limitations on staffing could impede the Patent and Trademark Corporation (PTC)'s ability to serve the patent and trademark community by delaying the processing and issuance of patent and trademark grants. Since the PTO is user fee funded, the PTO revenue depends on the amount of work accomplished by



PTO employees. A mandatory FTE ceiling would limit the size of the work force and, hence, limit PTO revenue.

### III. RELATIONSHIP OF THE PATENT AND TRADEMARK OFFICE WITH THE DEPARTMENT OF COMMERCE

One means for increasing operating flexibility is to give the corporation direct statutory powers. Currently, the Secretary of Commerce is empowered to vest any of the PTO's functions in himself or in any other official of the Department of Commerce (DOC). Thus, while fully integrated into the DOC, the PTO is subject to outside operational control. Independence from operational control by the DOC is necessary to increase management flexibility and effectiveness.

Even so, full independence of the PTC from a cabinet member would not facilitate the alliance of patent and trademark policy with the broader economic and trade policies. This alliance is crucial in a time when intellectual property forms the cornerstone of growth industries and is such an important component of U.S. economic competitiveness. Therefore, the PTC would need a cabinet member representing PTC interests with the President, other executive departments and Congress.

Properly crafted, a corporate charter could reduce problems associated with outside operational control, but preserve the necessary relationship with a cabinet officer. The best choice for the PTC appears not to be integration into the DOC, but instead placing the corporation under the policy direction of the Secretary of Commerce or another trade related cabinet member while empowering a Commissioner/Chief Executive Officer (CEO) to conduct all aspects of daily operation. This cabinet member or a newly created Under Secretary for Intellectual Property could work with other government departments to develop U.S. policy with respect to intellectual property. Such a direct relationship would maintain the ties necessary for the PTC to be responsible to the needs of both the national and international community.

### IV. ROLE OF COMMISSIONER/CHIEF EXECUTIVE OFFICER

The proposed changes in H.R. 1659 will greatly impact the role of the Commissioner. Under the current law, 35 U.S.C. §3(a) specifies that the Commissioner, the Deputy Commissioner, and the Assistant Commissioners shall be appointed by the President with the advice and consent of the Senate. The Secretary of Commerce shall appoint all other officers.

While the selection and appointment of the Commissioner remains unchanged between 35 U.S.C. §3 and H.R. 1659, the titles and appointments of virtually all other officers have been changed. The most significant and over-riding change is visible in the proposed power of the Commissioner. Other than his or her own appointment, the Commissioner is now responsible for the appointment of all other officers of power.

In this unconstrained environment, the Commissioner would have the ability to select those persons with whom he or she is best able to work, and delays caused by presidential appointment and Senate consent would be avoided in the case of officers under the Commissioner. The Commissioner may also name officers and employees to address concerns or accomplish tasks which previously had gone undone or "fallen between the cracks" of other persons' jobs.

However, we must also consider the consequences of a lack of checks and balances on the appointment of officers. The proposed requirement that the Deputy Commissioner of Patents and the Deputy Commissioner of Trademarks be persons with "demonstrated experience in patent law and trademark law" respectively, is a minimal and vague burden for the Commissioner to prove in his/her selection process. The Commissioner would have broad powers to define and select officers, employees, and agents of the Office. While this power would provide the Commissioner with flexibility, the Commissioner alone would "consider what is necessary to carry out its [the PTC's] function" and to "define the authority and duties of such officers and employees and delegate to them such of the powers. . . ."

Questions arise as to how and if a Commissioner might know all that is necessary to carry out all the functions of the PTO, and when the Commissioner would have the time to define such authority and duties. Additionally, since Commissioners are selected for six year terms and available for reappointment, the concern arises whether each new Commissioner would come in and "reorganize" by appointing new officers, employees, and agents, and eliminating those appointed by the previous Commissioner. This would potentially put the PTO in a six-year cycle of flux which would be harmful to a consistent policy in the administration and examination of patent and trademark applications. Consistent Policy is necessary to maintain uniform standards upon which patent and trademark rights are granted and enforced.

Perhaps to address the above considerations, H.R. 1659, sec. 103 sets forth that the Commissioner shall consult with a Management Advisory Board "on a regular basis relating to the operation of the PTO." This provision needs to set forth what a regular basis would entail. Would a regular basis be six months, one year, or two years? The PTOS suggests that "regular basis" be defined as at least quarterly.

Further, the Advisory Board should be given oversight authority of appointments by the Commissioner/CEO. H.R.2533 does not provide for an Advisory Board. The PTOS finds a need for more accountability than is set forth in H.R. 1659 and H.R.2533 (the bills).

#### V. ROLE OF ADVISORY BOARD: A NEED FOR OVERSIGHT

As the name "Advisory Board" suggests, under H.R. 1659, the Board would serve in an advisory capacity. Unfortunately, "advisory capacity" means that the decisions of the Advisory Board would not be binding on the Commissioner of the PTC.

In traditional corporations, corporate management and control is separate from ownership of a corporation. More specifically, the management and control of a corporation are commonly vested with a board of directors, while the ownership of a corporation is commonly vested in the hands of shareholders. The rules by which the corporation is run are generally laid out in a hierarchical fashion. At the top of the list of rules is the "corporate charter" followed by the "bylaws" of the corporation.

The current PTO system operates within the confines of a traditional government entity located within the DOC. Under a corporate charter, desired provisions of the current system could and should be maintained. Giving warranted deference to the status quo, one would think that the charter should parallel the current system except in the aspects where there is an articulable reason to change the current system. In our opinion, specific examples of where change is needed include FTE ceilings and procurement practices.

The traditional corporation consists of a board of directors with a fiduciary responsibility to the shareholders of a corporation. In a PTC, there would be no shareholders in a traditional sense of the word. It has therefore been argued that since there would be no shareholders in the PTC, then there is no need for a board of directors to represent their interests.

The PTOS, however, believes there is an interested body who could be analogized to shareholders of a PTC. To explain, the term "customer" has recently and repeatedly been used in part to represent the applicant for invention or trademark. While the term customer seems inappropriate to some who deal in the patent and trademark area, it should be remembered that in a corporate context the customer is not the primary beneficiary of a corporation. The primary beneficiaries of a corporation are indeed the shareholders. We see an analogy between such shareholders and the American public in that the American public is the true beneficiary of the patent and trademark systems in that the systems advance this Nation's technology and economy. Applying this analogy, it is reasonable to have a body of individuals who represent the interests of the American public serve as a board of directors.

A board of directors, if structured correctly, could provide such representation and would still allow management the flexibility it needs to respond to changing demands. The primary benefit of this board of directors would be to provide needed continuity and experience throughout the years in the running of the PTC. This continuity would be preserved by having members serve non-concurrent terms. With a single CEO/Commissioner and no board of directors, this continuity is simply not possible. Additionally, the board of directors could provide a very important avenue of communication to the public and bar organizations.

It is critical, however, that the board of directors' power not limit the flexibility which the Commissioner needs. While we simply are not sure of how the board of directors could exert control over the Commissioner, some suggestions are providing the board with a  $\frac{2}{3}$  override vote capability or in some other manner providing the board a mechanism by which to curb fundamentally inappropriate behavior. We would suggest that the board of directors not be mandated into making any kind of routine procedure or law such as a type of bylaw. Subjects of the board of directors' concerns could include policies, budget, appointments of officers, debt accumulation, and real estate acquisition; and fees if the Commissioner is given the authority. These are powers which the H.R. 1659 proposes the Advisory Board should deal with, but currently are now only advisory.

Ordinarily, in a corporation, the shareholders have the power to remove members of the board of directors, with or without cause. In the PTC as envisioned by H.R. 1659, there is no provision for removal of members of the Advisory Board even though such members will be appointed by the President and both houses of Con-

gress. If the President and Congress have the power to appoint, then they should also have the power to remove. Whoever appoints, the appointing body should have the power to remove.

#### VI. SEPARATION OF POWERS: CONSTITUTIONALITY OF A BOARD

The proposed H.R. 1659 Advisory Board would have influence as a consulting body only and would have no authority over the Commissioner. Also, some members of the Advisory Board would be appointed by Congress. This is not seen to violate separation of powers in that such an Advisory Board would not exert administrative or enforcement powers. Under the PTOS advocated board of directors, however, a board of directors would replace the Advisory Board.

The board of directors would have administrative and enforcement powers and thus the board members could not be appointed by Congress. Given the structure recommended by the PTOS, it would seem viable for a secretary or cabinet member to appoint the board members. A secretary working in a trade related entity would be in touch with the intellectual property community and could assist in the selection of effective board members.

As noted previously, H.R. 1659 proposes that the Commissioner be appointed for a term of six years and continue to serve until a successor is appointed and assumes office. A Commissioner may be reappointed to subsequent terms. The position of Commissioner is no longer absolutely tied to the political party of the President. While the Commissioner is still appointed by the President, the Commissioner's time of service may outlast that of the President who selected him.

This increased term may lead to improved stability of PTO operational management, but may also lead to political squabbles or difficulty over policy. Imagine the situation where the Commissioner, who is now to be advisor to the President, is of one political party and is recommending changes in law or policy to the President of another political party. To preserve the advantage of increased stability and to mitigate the instability from political difficulty over policy, the operational functions could be vested in the Commissioner and the policy responsibilities vested in a cabinet member.

#### VII. TITLE 5: CIVIL SERVICE RULES

While we do not want to undermine the purpose and effect of any union, we do feel it necessary to make a few comments on certain aspects of Title 5.

We appreciate the need for flexibility in management of the PTO. On the other hand, much of Title 5 would provide protections to the PTC work force necessary for the proper functioning of the patent and trademark systems. Therefore, we believe Title 5 should apply to the PTC except where the professionalism of the patent and trademark systems is enhanced by excluding Title 5. Both the undesirable and desirable proposed exclusions to Title 5 are discussed below. We believe Title 5 or an equivalent should be kept unless otherwise stated below.

##### A. Undesirable Title 5 Exclusions

The PTOS believes that H.R. 1659 and H.R. 2533 propose to exclude many provisions of Title 5 which should not be excluded. The employees at the PTO stand as a fulcrum between the inventor/trademark owner and the needs of the public at large and are required to be an impartial quasi judge in the granting of patent and trademark rights. Any change to job security that would impact impartiality would be deleterious to the patent and trademark systems because a potential conflict would arise between the need for personal security of the PTC employee and undue outside *ex parte* influence.

In these interests, the PTOS believes that the following provisions of Title 5 should apply to a government corporation. First, employees should only be removed for cause. Second, procedures for handling unacceptable employee behavior should involve written warnings and accusations. Third, if reductions in force are necessary, retention preferences should be in place.

##### 1. Removal for Cause

Both H.R. 1659 and H.R. 2533 propose to eliminate provisions of Title 5 which give PTO employees job security. The bills propose to exclude the provisions of Title 5, Chapter 33 specifying that the Office of Personnel Management (OPM) sets specific guidelines concerning removal of employees. Under 5 U.S.C. § 3393 of Chapter 33, there is a one-year probationary period for career and career-conditional employees. After the one-year probationary period, employees can only be dismissed for cause (as supported in Chapters 35 and 43 of Title 5). Without § 3393, job security is diminished.

Employee job security should be present in the PTC. PTO employees act in a quasi judicial capacity since they must make legal decisions on the merits of cases. Outside influences should not be able to affect removal of employees. As an example, when an overly zealous attorney threatens to complain to management, employees should have confidence in existing job security to stand behind an unpopular but correctly rendered decision. Do not sacrifice integrity for the sake of efficiency. When the integrity of the patent and trademark system is sacrificed, the only winners are litigators.

Not only is employee job security important for maintaining the integrity of the patent and trademark systems, but also employee job security facilitates recruiting and maintaining a competent work force. For these reasons, §3393 should not be excluded from the charter of a government corporation.

### *2. Performance Appraisal*

H.R. 1659 and H.R. 2533 propose to exclude Title 5 performance appraisal structures from the PTC. The Bills propose to exclude Title 5, Chapter 43, entitled "Performance Appraisal," which provides guidelines for dealing with unacceptable employee performance. An employer under this section is entitled to remove an employee for unacceptable performance. An employee under this section is entitled to: 30 days advance written notice of proposed action which identifies specific instances of unacceptable performance, be represented by an attorney or other representative, reasonable time to answer orally and in writing, and written decision which spells out unacceptable performance in reduction in grade or removal.

The PTOS believes that it is necessary to provide specific steps for dealing with unacceptable performance. Procedures for handling unacceptable performance should involve written accusations to reduce the likelihood of arbitrary and unfair harassment. Such harassment would adversely affect the level of professionalism at the PTC. Thus, Chapter 43 should not be excluded.

### *3. Retention Preferences*

H.R. 1659 and H.R. 2533 propose to exclude provisions of Title 5 relating to retention preference during reductions in force. The bills proposes to exclude provisions of Title 5, Chapter 35, which mainly relates to reductions in force (RIFs). For a PTC to properly function in its mandate of issuing valid patents and trademarks, it is imperative that the PTC employ qualified examiners. PTO employees make a commitment to their employer by specializing in patents and trademarks. To ensure that the proposed PTC continues to benefit from the skilled judgement these experienced employees would provide to the PTC and to less experienced employees, the PTC should make a reciprocal commitment to its work force.

Removing Chapter 35 from the Title 5 provisions allows for future removal of employees during a "slow period," without any particular retention preference. Because more experienced workers have become more specialized, these experienced workers, who have made a larger commitment, should be protected. Chapter 35 should not be excluded.

### *B. Desirable H.R. 1659 Title 5 Exclusion: Selection and Placement of Employees*

The PTOS believes that the following provision of Title 5 should not be binding on the proposed PTC if the PTC is to adequately serve the patent and trademark community and the American public. The government corporation should not be required to follow OPM's regulations concerning selection and placement of employees.

H.R. 1659 and H.R. 2533 propose a government corporation that would not be subject to many of the regulations of OPM regarding selection and placement of employees. Both H.R. 1659 and H.R. 2533 exclude portions of Chapter 33. Chapter 33 provides some basic guidelines with respect to hiring employees including nine civil service rules, but the majority of provisions which directly relate to the employees of the PTO are left to the discretion of OPM. OPM's current hiring guidelines involve very specific procedures which are drawn to employment in any agency of the Federal Government. The complexity of these hiring procedures inhibits the PTO's recruiting efforts. While the portion of Chapter 33 which gives OPM authority to set hiring guidelines should be excluded, a minimum level of qualifications for employees should be set forth in the charter of the PTC to ensure the hiring of highly qualified personnel. Basic employee qualification guidelines are necessary to reduce the effect of patronage and promote the professionalism of the PTO.

### *C. Desirable H.R. 1659 Title 5 Modifications*

The PTOS believes that some of the Title 5 modifications proposed by H.R. 1659 and H.R. 2533 would be desirable. Maintaining retirement and insurance benefits at current levels, but allowing supplementation of these benefits would be desirable.

### 1. Retirement Benefits

Retirement benefits are maintained at current levels, but may be increased under H.R. 1659 and H.R. 2533. Both bills require that employees receive retirement provisions subject to Chapters 83 (relating to the Civil Service Retirement System) and 84 (relating to the Federal Employees' Retirement System) of Title 5. Under both H.R. 1659 and H.R. 2533, the retirement benefits of Chapters 83 and 84 of Title 5 could be supplemented.

Using current retirement benefits to set a minimum level would facilitate a transition into a government corporation. A good retirement package is an important reason why many PTO employees chose to work for the PTO, rather than in the private sector. Allowing the Commissioner to increase retirement benefits also gives the Commissioner flexibility to raise retirement benefits if the Commissioner believes that doing so would be in the best interests of the PTC. For instance, the Commissioner could determine that a better retirement benefits package would encourage employees to stay with the PTC for their entire career.

### 2. Insurance Benefits

Under H.R. 1659, insurance benefits must be maintained at levels at least as good as current levels. H.R. 1659 provides that officers and employees of the corporation shall remain subject to Chapters 87 (relating to life insurance) and 89 (relating to health insurance) of Title 5. These benefits, however, may be changed as long as the changes do not result in the benefits becoming, on the whole, less favorable.

If the Commissioner does change the insurance benefits, it may be difficult to measure whether the proposed benefits are less favorable. Thus, this provision of H.R. 1659 may be a source of litigation.

In contrast to H.R. 1659, H.R. 2533 maintains insurance benefits at current levels, but allows increases in insurance benefits. Under H.R. 2533, the insurance benefits of Chapters 87 and 89 of Title 5 could be supplemented. This supplementation of benefits scheme is similar to how both H.R. 1659 and H.R. 2533 handle retirement benefits.

Allowing the Commissioner to increase insurance benefits gives the Commissioner flexibility to raise insurance benefits if the Commissioner believes that doing so would be in the best interests of the PTC. Further, using current benefits to set a minimum level avoids the danger of litigation involved in H.R. 1659's language which sets forth a "on the whole, less favorable" standard.

### D. Other Title 5 Exclusions

Additionally, the PTOS has concerns regarding other Title 5 exclusions. Both H.R. 1659 and H.R. 2533 propose to eliminate the General Schedule (G.S.) system at the PTO. The bills exclude Title 5, Chapter 51, which classifies and sets forth the amount of supervision and what is to be performed for each G.S. level. Chapter 51 sets the following guidelines for grading employees: a) The principle of equal pay for substantially equal work will be followed. b) Variations in rates of basic pay will be in proportion to the substantial differences in difficulty, responsibility and qualification requirements. c) Individual positions will be grouped in and identified by classes and grades.

Although the PTOS realizes that classes and grades inhibit flexibility, we also find a) and b) above to be important in maintaining employee morale which has a direct correlation with employee professionalism. These two principles should be preserved in the charter.

Both H.R. 1659 and H.R. 2533 propose to exclude the pay rates and schedules of Title 5. Chapter 53 of Title 5 sets the G.S. pay rates and schedule. By excluding Chapter 53, the bills could realize some advantages such as flexibility to set wages without prior approval from OPM. Higher wages could be offered to allow the corporation to attract and hire qualified people through competitive compensation. On the other hand, eliminating Chapter 53 means there would be no assured periodic pay raise and defined promotion times and benefits in the charter of the corporation. The PTOS finds that many employees would be demoralized/troubled by the loss of a predictable, reliable pay system. Since professionalism could suffer if the well-defined pay schedule in Chapter 53 were to be excluded, the PTOS urges the Subcommittee to weigh these competing factors carefully.

These concerns about the pay scale could be addressed in the same manner that both H.R. 1659 and H.R. 2533 approach retirement benefits. In the same way that setting a base level with added flexibility is desirable in the context of retirement benefits, maintaining the current compensation system as a base level will satisfy employees that they will not be paid less, while allowing the corporation to offer higher wages to attract and retain employees. To achieve this goal, the bills could be amended such that the PTC would remain subject to Chapter 53, except that the

PTC could provide compensation to supplement the compensation otherwise provided under Chapter 53.

Even though much of Title 5 is excluded, H.R. 1659 restricts the scope of collective bargaining. H.R. 1659 proposes to retain a majority of Chapter 71 of Title 5 (relating to collective bargaining), while setting forth a number of exceptions. Specifically, H.R. 1659 proposes to exclude bargaining with respect to the establishment, implementation, amendment, or repeal of any system of classification of employees, any compensation system, any system to determine qualifications and procedures for employment, and means and methods for doing work. In contrast, H.R. 2533 retains all of Chapter 71. H.R. 2533 also establishes a joint labor management committee to make recommendations concerning the design and implementation of any position classification system, and any system to determine the qualifications and procedures for employment, and contributions to retirement and benefits programs.

The PTOS encourages an effective partnership between labor and management. Furthermore, we would hope that this relationship be guided by the principles of professionalism in the PTC and enhancement of the American intellectual property system.

In conclusion, while an equivalent of many of the current protections of Title 5 is desirable, the rules which impose these protections can be burdensome. There is a clear distinction between having protection, and having clear rules which provide the protection. If drafting legislation to provide the desirable protection and benefits of Title 5 is impractical, then neither H.R. 1659 nor H.R. 2533 should exclude any chapters of Title 5.

#### CONCLUSION

We hope you will take into consideration all our suggestions, comments and concerns in these very important decisions. We know that you will make the best choices possible for the benefit and welfare of the entire intellectual property community.

Mr. MOORHEAD. Mr. Tobias.

#### STATEMENT OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Good morning, Mr. Chairman. Thank you very much for providing NTEU an opportunity to testify on this most important issue. NTEU supports the concept of creating a more flexible PTO. PTO should have more control over its budget, particularly since fees from the public finance, as we know, indeed, more than finance its current operation.

But, Mr. Chairman, NTEU objects to the underlying premise in both H.R. 1659 and H.R. 2533 that increased PTO efficiency can be gained by reducing title 5 protections to employees and by eliminating the right of employees to speak collectively through their elected representatives. I firmly believe, Mr. Chairman, that the labor relations history in the private and now Federal sector shows that breakthrough increases in efficiency occur after employees feel basically secure and those secure employees and their union create partnerships forged on increasing productivity and efficiency.

Now the history of labor management in relations in the Federal sector is one marked with hostility and adversarial collective bargaining. This began to change with the issuance of Executive Order 12871, issued by President Clinton, which expanded the scope of bargaining and directed the creation of partnerships in the Federal sector. The expansion of the scope of bargaining, coupled with the creation of partnerships between labor and management, have substantially, not just a little bit, but substantially increased productivity and efficiency in many Government agencies and substantially cut the costs of administering programs in the Federal sector.

Now both H.R. 1659 and H.R. 2533 would turn back the clock in the Federal sector by not only restricting the scope of bargaining, but also in eliminating basic employee protections. That is not a prescription for increased efficiency; it is a prescription for fear, anxiety, and hostility.

Specifically, H.R. 1659 eliminates substantial title 5 employee protections. It eliminates all mandatory subjects of bargaining which have been part of the Federal sector programs since 1963 and states that bargaining may occur on the procedures to implement the decisions that management makes. Now the same is true for H.R. 2533, where sole and exclusive authority is vested in the chief executive officer and there is no guaranteed role for employees and few guaranteed protections at all.

Neither bill creates an atmosphere conducive for employees to focus on the needs of the agencies. Employees must feel sufficiently secure in their jobs in order to focus on the needs of the agency. Creating a new PTO founded on basic rights and benefits will allow employees to participate in designing and redesigning work processes without fear. They will, Mr. Chairman, be in a posture to be willing to give their discretionary energy, the energy that can't be extracted from any employee, that can be given when a construct is created where it is welcome to be given. And we think that that is a critical need in creating a new PTO.

Mr. Chairman, we are also opposed to the language in H.R. 1659 which would allow contracting out whenever management, quote, "deems it appropriate." We urge that the Congress include a specific test, The test Congress enacted in the Resolution Trust Corporation Completion Act where noncorporation employees do the work, quote, "where the use of such services is the most practicable, efficient, and cost effective." This would give Congress an evaluative test to conduct oversight, and employees a valuable test to determine their efficiency in comparison with the private sector.

So, in short, Mr. Chairman, we support the concept of a reorganized PTO, but we believe that it has to be done in the context of the absence of fear and the inclusion of employees as part of the process.

Thank you very much.

[The prepared statement of Mr. Tobias follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. Chairman, Members of the Subcommittee, I am Robert Tobias, National President of the National Treasury Employees Union (NTEU). On behalf of the more than 150,000 Federal workers represented by NTEU, I appreciate your invitation to present testimony today as the Subcommittee continues its examination of H.R. 1659, the "Patent and Trademark Office Corporation Act of 1995," and H.R. 2533, the "United States Intellectual Property Organization Act of 1995."

NTEU supports the concept of increasing flexibility by establishing the U.S. Patent and Trademark Office (PTO) as a wholly owned government corporation. However, we remain concerned about a number of the legislative proposals currently before this Congress (including H.R. 1659 & H.R. 2533) which reflect drastic reductions in employee rights and protections as a precondition to achieving this goal. NTEU strongly believes that it is indeed possible to create a more efficient and cost effective patent and trademark operation without compromising critical employee protections that help ensure a fair work environment. We also believe that this can be accomplished without compromising the flexibility management needs to better serve its customers and the American public. NTEU is committed to working in

partnership with the Congress and the Executive Branch to achieve these goals. I thank you for the opportunity to present our views.

NTEU represents a total of approximately 2,500 bargaining unit employees at two local chapters at the U.S. Patent and Trademark Office. The employees of NTEU Chapter 243 are involved in all phases of the patent application process—from handling mail, to other tasks directly related to the adjudication of patent applications. The Trademark Society, NTEU Chapter 245, whose President, Howard Friedman joins me here today, represents the professionals who process Trademark applications. PTO plays a crucial role in the development of new industries in our economy, and these employees are vital to the successful operation of the Office. Employees of the PTO perform an inherently governmental function that appropriately belongs in the public domain.

Before commenting on the specific PTO corporatization proposals pending before the Subcommittee, I would like to take a moment to say a few words about the federal workplace of the future and the role of the federal employee in responding to increased efficiency demands in an increasingly competitive global marketplace.

No one feels stronger about the meaningful transformation of the Federal workplace than Federal employees. Federal employees and federal employee Unions, particularly NTEU, recognize the world is changing and evolving at an ever faster rate. We are conscious of the budget deficit and its impact on pay, benefits, training, office supplies, and federal employee work life. We see it; we feel it; we know it. Federal employees have arguably given more toward deficit reduction efforts than any other single group over the last decade.

Today's economic and political realities have created a climate ripe for meaningful change in the federal service delivery system. It is critical, however, that current efforts to reinvent government go beyond meeting the political objectives of one party or another. As this Subcommittee and the 104th Congress explore options to reinvent and reorganize the Patent and Trademark Office, it is important to remember that the Federal employees on the front lines of the PTO effort are critical to the successful implementation of any reform initiatives. These employees can offer an informed and valuable perspective on the kinds of changes that are needed—a perspective that ought to be considered if the Congress is indeed serious about creating a cost efficient and effective reorganization. Mr. Chairman, for these reasons I especially appreciate your inviting Howard Friedman, President of NTEU Chapter 245, to testify here today, along with our other union colleagues. Federal employees, and their elected Union representatives stand solidly with the Executive and Legislative branches of government in the effort to bring change in the way services and benefits are delivered to the American public.

To increase efficiency and productivity in the federal government, particularly with static or decreasing agency budgets, the creation of successful labor-management partnerships is critical. Because union leaders have historically been excluded from operational decisions and policy-setting, the focus has been on getting one's voice heard through the adversarial system of grievances and unfair labor practice charges. This approach emphasizes waiting for a manager to make a mistake, then trying to fix the inappropriate management behavior. Pre-decisional involvement leads to better initial decisions together with faster implementation of needed changes. Formally involving employee representatives in the decision-making process increases the effectiveness and productivity of such operations and policies.

Only by changing the nature of Federal labor-management relations so that managers, employees, and employees' elected Union representatives serve as partners will it be possible to design and implement the comprehensive changes necessary to reform the Federal government. The synergy of overlapping union and management goals provides the potential commitment and energy necessary to overcome the resistance to change and the inertia of the status quo. I wish to stress to the Subcommittee that labor and management can transform the federal workplace into one where employees want to give their discretionary energy because they are excited, challenged and empowered by their work. Such a workplace can be created in the context of a labor-management partnership and it will support a more productive and efficient government. I will discuss this issue in the context of the specific legislation at hand, later in my testimony.

#### EMPLOYEE PROTECTIONS & LABOR MANAGEMENT RELATIONS IN H.R. 1659 & H.R. 2533

NTEU recognizes the potential employee gains that can be realized from transforming the PTO into a government owned corporation, and we support the basic objectives behind the Administration's and the Subcommittee's undertaking of this effort. While we support the basic concept of a PTO Corporation, however, NTEU is extremely concerned about, and opposed to, language in both H.R. 1659 and H.R.



2533, which would give federal employees and their unions fewer rights than they have today under Title V of the United States Code, and very few of the rights in President Clinton's Executive Order 12871 which establishes the new form of labor-management relations envisioned by his Administration.

Both H.R. 1659 and H.R. 2533 remove critical statutorily created rights that currently protect PTO and other federal employees. Section 3(e) of H.R. 1659, and Section 3(9) of H.R. 2533 exempt the new Corporation from several important chapters of Title 5 of the United States Code, including various aspects of: chapter 31 (authority for employment); chapter 33 (examination, selection and placement); chapter 35 (retention preference, restoration, and reemployment); chapter 43 (performance appraisal); chapter 45 (incentive awards); chapter 51 (classification); and subchapter III of chapter 53 (general schedule pay rates).

These provisions eliminate key elements of the civil service statutes and dissolve some of the most basic expectations of employees serving in our Nation's civil service system. NTEU is concerned about the potential impact of this legislation on the PTO's employees, especially with what we perceive as insufficient checks on the power vested in the Chairman of the new Corporation. Not only do both bills exempt the employees from these critical civil service protections, they also fail to incorporate substitute checks or appropriate accountability standards to guard against arbitrary actions by federal managers.

Section 103 (9) on pages 13 and 14 of H.R. 1659 also raises compelling concerns for NTEU, since the language in this section would eliminate all substantive bargaining, including bargaining over several issues permissible under current law. Subsection (1) would prohibit implementation bargaining rights that are currently allowed. The language in subsection (2) is even more problematic. Mr. Chairman, this subsection greatly diminishes existing employee rights since it eliminates a host of additional topics subject to mandatory bargaining since the inception of the labor-management program in 1963. This would leave the corporation's employees without statutorily mandated subjects of bargaining and would limit employee participation to procedures and appropriate arrangements bargaining.

Mr. Chairman, we urge that the language be amended to at minimum contain the mandatory subjects of bargaining contained in section 7106 of title 5, and Executive Order 12871.

The elimination of title 5 requirements over pay, classification, performance appraisals, and other key issues in both H.R. 1659 and H.R. 2533 leave employees very vulnerable. The bills give sole discretion to the head of the agency without any check on arbitrary or unfair action. This is not the "status quo" in labor relations, as is often stated by proponents of these bills. Presently, even where employees cannot bargain, they can enforce the rights given by statute through the grievance procedure. Unfettered management discretion over these issues would truly turn the clock back. If there are no rules, then fairness cannot be ensured.

With regard to H.R. 2533, it too eliminates bargaining on matters historically subject to the bilateral process in favor of "sole and exclusive" discretion vested in the Chief Executive Officer." The elimination of rights will not create more efficiency of agency operations.

Basic protections must be provided in the statute in order to allow the participants to feel sufficiently secure to focus on the needs of the agency and not solely on their own protection.

I strongly believe that the best solution is to allow bargaining over all of the subjects. This would allow employee input, and would still maintain management flexibility.

#### LABOR-MANAGEMENT PARTNERSHIPS

NTEU supports the language included in H.R. 2533 to establish a joint committee comprised of both management and labor designees to assist the CEO by making recommendations in certain key areas. Section 103, subsection "j" of H.R. 2533 establishes a joint committee comprised of labor and management personnel. While this language only allows for a labor role to assist the CEO by making recommendations concerning the design and implementation of systems related to position classification, qualifications and procedures for employment, compensation and awards, and contributions of the Organization to retirement and benefits programs; it represents a step in the right direction.

NTEU recommends that the Subcommittee improve this language to ensure that employee recommendations are fully considered before any changes in these policy areas are made. We also recommend that similar language be included in H.R. 1659.

The creation of labor-management partnerships in the federal sector is a recognition that the challenges of the future can not be met within the existing framework of centralized personnel management and adversarial labor relations. Employee participation in decision making enhances morale, increases productivity, improves the work environment, and will assist the government in achieving its goal of creating a more effective and less costly government. It is becoming more and more evident that an employee's productivity is linked to an employee's work processes and work procedures. Involving employees in work process decisions will enhance productivity because they have the knowledge, skills and ability to understand what the work entails and what must be done to improve it.

#### CONTRACTING OUT

NTEU is also concerned about a number of the contracting-out provisions included in sections 102(b) of both H.R. 1659 and H.R. 2533. Language in this section of both bills would permit the Corporation to ". . . use, with the consent of the agency, government, or organization concerned, the services, records, facilities, or personnel of any State or local government agency or instrumentality or foreign government or international organization to perform functions on its behalf." The bills even go further to include language that would allow the Corporation to ". . . enter into and perform such contracts, leases, cooperative agreements, or other transactions with international, foreign and domestic public agencies and private organizations and persons as needed in the conduct of its business and on such terms as it deems appropriate."

Over the last 13 years, many decisions were made to contract out work done by Federal employees merely because it created the impression that government was being reduced, costs were being cut, and that Federal managers were making decisions like private business managers do. Nothing could be further from the truth. Because of this political predisposition to contract out work, there are many cases where it costs more to privatize than had the work been performed by government employees. The true number of employees whose work is funded with tax dollars is hidden from the public, and legitimate accountability continues to be masked behind press releases about process over the bottom line.

Like the Congress, NTEU is also committed to ensuring that all activities of any resulting PTO corporation are executed in the most efficient and cost effective manner. For that work which is susceptible to privatization, a fair and open process should be created to ensure that Federal employees are replaced only if a substantial saving can be guaranteed. With this in mind, I propose that the Committee include language in this section similar to that approved and signed into law as part of the Resolution Trust Corporation Completion Act of 1993 (P.L. 103-204). This language states that the use of non-Corporation employees to perform the work of the Corporation should be done only where the use of such services is the most practicable, efficient, and cost effective. Such language would ensure that critical factors such as these are appropriately considered as an important part of the decision to contract out.

#### CONCLUSION

NTEU cannot support legislation that is more restrictive than the current construct of collective bargaining in the federal system. While we support the Committee's goal of eliminating FTE ceilings and retaining all user fees collected, we do not feel that eliminating basic employee protections is necessary to achieve this goal. If the corporation is to draft an entirely new set of employment rules, collective bargaining is the only viable check and balance, and guaranteed right of participation that has stood the test of time.

In today's business environment, employees are often considered a cost on the same basis as capital and raw materials. It is assumed that workers' interests are antithetical to those of management. As a result, workers become alienated from the organization. They are denied the dignity of their work; their participation in decision making is devalued and discouraged, and they and their Union representatives are treated as adversaries who must be kept at arms length from the decision-making process.

Mr. Chairman, this Committee has an opportunity to reverse the philosophy that has shaped the relations and processes of the Federal agencies for most of the last century—a management method which emphasizes top-down communication, and views workers as an extension of their machines in an integrated system where, at its essence, everything is viewed as a cost that must be minimized. In reinventing this outmoded management theory, the government must do what the most successful American companies have done. So called "scientific management practices"

must be discarded in favor of worker-empowering, high quality, high worker-value practices.

This Subcommittee has an opportunity to seize the day and demonstrate the vision and the courage to establish clear organizational goals and objectives for the PTO. As part of this thinking, workers must be viewed as assets to be developed, not solely as costs that must be minimized, and the government's relationships with its employees and unions must be transformed from adversarial to partnership. You have an opportunity to implement the empowerment ideas articulated by both Speaker Gingrich and President Clinton, and give workers the authority and autonomy to do the work; and make the necessary long term investments in employee training, support and technology. In this way, the new PTO Corporation will be able to more effectively satisfy customer requirements, while reducing operating expenses.

Mr. Chairman, this Subcommittee has an excellent opportunity to create an efficient organization that meets the needs of its customers, while at the same time taking us closer to a fiscally responsible government. With the proposed reorganization of the PTO, Congress has an opportunity to go beyond the simple rhetoric of "partnership" and "empowerment," and realize that true partnership and empowerment presents a genuine opportunity for the innovation, transformation and bottom line results necessary to achieve the goal of a more responsive and effective PTO. A good labor-management relationship is imperative to a successful quality improvement effort, and an important part of the overall PTO equation.

NTEU remains willing to work closely with you to try and achieve these goals. Again, I thank you for the opportunity to testify before the Subcommittee today, and I am happy to answer any questions you may have.

Mr. MOORHEAD. Mr. Stern.

#### STATEMENT OF RONALD J. STERN, PRESIDENT, PATENT OFFICE PROFESSIONAL ASSOCIATION

Mr. STERN. Thank you, Mr. Chairman. You've been a good friend of the Patent Office for a long time. Thank you for the opportunity to provide the views of the Patent Office Professional Association. Our organization represents approximately 2,200 engineers, scientists, and lawyers at the Patent and Trademark Office.

We, too, favor legislation to allow the PTO to retain all of its fee income, to spend it without appropriation, and to be exempt from the FTE ceilings, so that staff size can be commensurate with the number of applications filed. However, POPA strongly opposes H.R. 1659 and the other bills because they eliminate the underpinnings of the civil service system.

Patent examiners perform an adjudicatory function when they decide whether or not an applicant has met the statutory standards for the grant of a patent. In order to ensure the integrity of the examiners decision, it is essential that the examiner feel free of coercion and undue influence. It would be unfair for examiners to fear for their jobs every time unsuccessful applicants complained to their supervisors.

Given the quasi-judicial nature of the examining job, it becomes obvious that we are dealing with an inherently governmental function and not a business service that is provided to the patent applicant. It has been said that corporatizing the PTO is to be the model for the rest of the Government. It is more appropriate to make the PTO into a—it is no more appropriate to make the PTO into a CEO-controlled corporation than it would be to make our judicial system into such a corporation.

All the proposed legislation gives the chief executive officer of the new corporatized entity discretion to determine how employees are hired, classified, laid off, evaluated, and paid and exempts employees from the chapters of title 5 that would otherwise govern such

matters. The proposed legislation would also place these matters off limits to collective bargaining and the purview of such traditional oversight agencies as the MSPB, OPM, and the FLRA, and the Department itself. The result is to place virtually unchecked power in the hands of the CEO.

Under the proposed legislation as written, it would take an act of Congress to reverse a personnel policy. Too many people have forgotten about the abuses of power that the civil service system was intended to correct and have failed to appreciate the system's balance between fairness and efficiency achieved through years of refinement.

We ask that you help retain the provisions of title 5. The wholesale elimination of critical portions of title 5 of the Code threatens the fundamental culture of our system. It is that culture that is so critical to the employees we represent. It is a culture that honors and respects fairness and equity. It is a culture that says that there will be equal treatment of people in similar situations, including equal pay for equal work. It is a culture in which you will have an opportunity to defend yourself if you are accused of poor performance or wrong doing. But, most of all, it is a culture of honorable treatment in which you can expect to be free of unreasonable demands and coercion from those in positions of authority.

The most important reason for retaining the civil service system is that the public has the right to know that the power and authority conferred by the public to its Government will not be hijacked by unaccountable management personnel carrying out their personnel prejudices. Due process requirements for employee discipline and removal in which management must demonstrate the alleged poor performance or malfeasance of the employee is real are what protect the public from corruption of legitimate authority. Fair pay practices based upon published pay scales and objective placement rules protect both employees and the public from inefficiency and fraud.

We're just absolutely amazed that all the legislation before you provides for removal only for cause for the CEO but for no one else. Even the patent owners' representative on the first day of your hearings testified that employees deserve the protection of removal only for cause.

All of the proposed legislation will politicize the Patent and Trademark Office. The Commissioner will be a political employee. All other employees will be at-will employees whom the Commissioner can fire or replace as he or she chooses. Without the strictures of the civil service system, it will be completely legal to treat all the jobs in the corporation as patronage jobs. The existing perceived integrity of our examination process will be undercut.

When we surveyed our membership, 64 percent of the respondents said that they believed that their decisions may be compromised if the PTO corporation eliminates their civil service protection. When we asked whether they were willing to risk their civil service protection for the possibility of higher pay, 82 percent said, "No."

PTO employees have earned and deserve, their civil service rights. The PTO has been an example of hard work, productivity, and efficiency, in stark contrast to the stereotype of unproductive

and inefficient Government workers. All examiners are subject to a performance evaluation system in which they are fully responsible for quality, quantity, and timeliness. Production quotas are specified in 6-minute increments and many employees already put in lots of voluntary overtime. Surely it would be contrary to the family values that we all share to allow management the untrammelled power to demand even more output, thereby requiring employees to spend more evenings and weekends to meet ever-increasing goals.

In the past 15 years there has been a relentless drive to increase the productivity of examiners that is, to decrease the amount of time spent on each case. Each professional puts as much quality into the product as the time granted to him by management allows. Today the average amount of time spent per application is approximately 17 hours. How much less time can an examiner spend on a case and still put out a quality decision? You should know that the European Patent Office spends about as much time searching a patent application as our examiners spend on the entire prosecution of the case.

Our customers have been surveyed numerous times and have been extensively interviewed in focus groups. The No. 1 concern is with the quality of our work product, especially as regards the adequacy of the search of the prior art. Our employees have also been surveyed, most recently by an outside consulting firm that was hired by management as part of the reengineering efforts at the PTO. The No. 1 problem identified by employees is concern over quality. Our customers have spoken, our employees have spoken, but nothing has changed. Production and cycle time still take precedence over quality.

The prognosis for the future is clear. In a POPA-sponsored survey, our employees again expressed their belief that if PTO management were given the flexibility provided in the proposed bills, there would only be a further squeeze on quality.

Particularly pernicious is the performance agreement set forth in section 103(b)(3)(a) of the administration bill, H.R. 2533, to be established between the Secretary and the head of the Corporation. That agreement is to incorporate, quote, "measurable goals in such specific areas as productivity, cycle times, efficiency, cost reduction, innovative ways of delivering patent and trademark services and customer satisfaction." Conspicuous by its absence is any reference to quality or any measure of the correctness of the patent and trademark decisions that are made.

Our professionals recognize that all of their past hard work will now only serve as a new baseline for a production- and performance-driven CEO who wants to double his salary so that his income can exceed that of the President and all of Congress. Unfortunately, the easiest way to decrease costs and increase cycle times, so as to meet a performance agreement, is simply to order examiners to do less examination.

For example, if we don't classify foreign patents into our U.S. classification system, and then don't put them into our files, we will be more cost-effective. Not only will we save the cost of classification, but there will be fewer references to search. Thus, our examiners will be able to save time and research. Furthermore, if a

relevant reference is missed, they will be able to issue the application instead of having to write a rejection with all its attendant effort and time.

Of course, this is not the way to increase quality. If Congress is concerned about the quality of the work product, we recommend that you consider the professionalism and pride of the employees as a resource. The most direct way that you can utilize that resource is by providing an additional clause in section 103 that, in essence, provides for bargaining with the employee representative over performance evaluation systems and performance standards. Working in partnership with management, we will be able to increase the quality of our examination process.

I notice that the red light went on. I have other remarks. I hope that you will read them in the testimony.

Mr. MOORHEAD. If you have stuff that is so important, we'll take a minute or two and won't stop you—

Mr. STERN. Well, actually, there is one crucial item. I appreciate it. There is one really crucial item.

One of the things that was said at the first hearings, and it was said by the Commissioner and it was said by the Vice President, was that a similar system had been tried with the British Patent Office, and it produced cost savings of over 40 percent. Well, when I first heard that, it just sounded too good to be true. When we checked it out, it really was too good to be true. It just wasn't true. We have checked with the British Patent Office; we have gotten one of their annual reports. It turns out that the cost savings they were referring to was the cost of "common services" which is an item that deals with housekeeping functions. The major cost reduction in that housekeeping function was a move, a relocation from London to a very small town on the west coast called Newport, New South Wales, which is only a town of about 110,000. That would be the equivalent of moving the Patent Office to rural America in, say, West Virginia.

Frankly, I don't think that we need to pay our CEO double the salary of a Cabinet member in order to get him to move us to rural America. If we want to have those kind of cost savings, I'm sure that the committee could arrange it.

Mr. MOORHEAD. You know that there is a limitation on what they could make in the legislation. There are under the title—under our bill, title 3, they can get the Commission to approve an advisory committee which is made up pretty much of members of the public, key Members of Congress that have oversight, and other people, but they are managed—that limitation on there. Even though there is a limitation definitely on what the—

Mr. STERN. Your point is well—

Mr. MOORHEAD. They cannot go anywhere what the President makes.

Mr. STERN. Your point is well taken with respect to your bill, H.R. 1659. Unfortunately, the administration bill and Frank Lautenberg's bill in the Senate are, I think—have a different limitation.

Mr. MOORHEAD. I think you all know that these bills are not written in concrete. There were many changes that were made from our version into the version that was passed out. And it has

to go the full cycle before we get through it. We are interested in ideas. We want to get the very best bill we possibly can get when it passes, if it does pass. And your ideas are very important, and we aren't just letting you talk. They will all be considered and many of them will be adopted. So, I just want you to know, and the Tri-Lateral Commission and the Billerburgers have no control over the bill at all. [Laughter.]

Mr. STERN. Thank you very much, Mr. Chairman.  
[The prepared statement of Mr. Stern follows:]

PREPARED STATEMENT OF RONALD J. STERN, PRESIDENT, PATENT OFFICE  
PROFESSIONAL ASSOCIATION

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to provide the views of the Patent Office Professional Association. Our organization is the exclusive bargaining agent for the approximately 2200 patent professionals at the U.S. Patent and Trademark Office. The vast majority of the employees we represent are engineers, scientists, and lawyers who work as patent examiners.

In the proposals to reorganize the PTO, our membership sees both good and bad. There is virtually universal agreement that providing the PTO with the authority to retain its fee income, and to spend it without appropriation, is a benefit. We all recognize that charging someone a fee for a service and then diverting the fee to other purposes undercuts our ability actually to do the work. It also constitutes a tax on innovation which undercuts incentives to invent.

There is also virtually universal agreement that the ever-rising number of applications filed requires a commensurate increase in the staff needed to process those applications. When applicants pay a fee, they are entitled to receive the service they have paid for. The PTO is not taxpayer funded. It is unfair to take the users' money and then to deny service arbitrarily because of an FTE ceiling based upon a general desire to eliminate other government functions. Therefore, freedom from FTE ceilings is the logical solution.

But the reorganization proposed for the PTO goes way beyond providing for these two very beneficial effects. It dramatically changes the way in which personnel policy is generated, implemented and reviewed. In all of the free-standing bills, H.R. 1659, H.R. 2533 and S. 1458, personnel policy will be divorced in its most significant aspects from the current system, and placed entirely in the hands of the corporation's CEO. No significant checks and balances are built into the legislation. If the corporation establishes, for example, a pay system which creates unwarranted benefits for a few, it will take an Act of Congress to change that system.

The proposed legislation dismantles the most basic expectation of our nation's civil service system, namely, the expectation that your employment will continue so long as you perform acceptably and there is enough work to do. It also does away with the salary system as we know it, including the GS scale, within grade increases, objective performance measures coupled with the right, when needed, to a second chance to demonstrate improved performance, and the rules by which placement on the salary scales is determined. Job security, a treasured benefit of public employment, will disappear.

The proposed changes to title 5 of the United States Code threaten the entire culture of the civil service system. It is that culture that is so critical to my membership. It is a culture that honors and respects fairness and equity. It is a culture that says there will be equal treatment of people in similar situations. It is a culture in which you will have an opportunity to defend yourself if you are accused of poor performance or of wrongdoing. But most important of all, it is a culture of honorable treatment in which you can expect to be free of unreasonable demands and coercion from those in positions of authority.

Maintenance of that culture is especially critical to the job of the patent examiner if we wish to ensure public confidence in the decisions made by those examiners.

Patent examiners have several different constituencies. One such constituency is made up of those who seek patents, and it is they who may be dissatisfied with adverse decisions made in the examination process. Nonetheless, examiners are called upon to make such decisions, and it would be unfair for them to have to fear for their jobs every time an unsuccessful applicant decides to exert pressure by complaining to their supervisors. Those decisions must be made properly in order for patent examiners to serve capably other less visible constituencies. One constituency is the portion of the business community which would wrongly be denied the right to make, use and sell products and processes which, according to law, are not to

be protected by patents. Another constituency is the public who would needlessly pay a premium for patented products and processes that should be in the public domain. Yet, these other constituencies are naturally far less visible in the process, and are not considered to be "customers" by PTO management.

In order to ensure the integrity of the patent examiner's decision, it is essential that the examiner feel free of coercion or undue influence. It is because of the tension inherent in the fact that an examiner may have to make a decision adverse to the interest of a particular patent applicant that we say that an examiner operates in a quasi judicial capacity.

To better understand the role of the examiner, consider what would happen if there were no examination system. We could still encourage science and technology by giving inventors a patent to their inventions. We could rely entirely on the integrity and knowledge of the applicant to determine what is novel and worthy of protection. That, in fact, has been tried and it's called a registration system. It has been tried in this country. In the forty years prior to 1836, there was only a registration system in the United States. Because it resulted in excessive litigation it was considered a failure and replaced with an examination system. Because applicants are not necessarily objective about their own inventions, a self-nomination system tends to lead to a lot of litigation over whether what the inventor believes is his invention actually meets the conditions for patentability. Just as much as a valid patent will encourage science and invention, an invalid patent can be used to stifle competition. An invalid patent can be used as a sword to harass a competitor.

Once one recognizes the quasi judicial nature of the examination job, it becomes obvious that we are dealing with an inherently governmental function, and not a business service that is provided to the patent applicant. It has been said that corporatizing the PTO is to be the model for the rest of the government. It is no more appropriate to make the PTO into a CEO controlled corporation than it would be to make our judicial system into such a corporation.

Both H.R. 1659 and the administration bill will politicize the Patent and Trademark Office. The Commissioner, or the CEO, will be a political appointee. All other employees will be "at will" employees whom the Commissioner can fire or replace as he or she chooses. Without the strictures of the civil service system, it will be completely legal to treat all the jobs in the Patent Office as patronage jobs. The existing perceived integrity of our examination process will be undercut. U.S. patents will no longer be seen as valid, since patent validity is inextricably linked to the integrity of the examination process.

When we surveyed our membership, 64% of the respondents said that they believed that their decisions may be compromised if the PTO Corporation eliminates their civil service protections.

Politicization is not the only adverse consequence of eliminating the civil service status of our employees. It is likely to demoralize the employees and not very likely to produce enhanced performance. Our members feel so strongly about this matter, that when they were asked whether they were willing to risk their civil service protections for the possibility of higher pay, 82% of the respondents said no.

Most examiners, when they first come to the PTO with their engineering or science background, are in a position to get jobs in other organizations. As time goes on, those employees' abilities to get jobs in other organizations decrease because, the special skills they acquire in order to be promoted are not transferable to other organizations. By the time employees are primary examiners, their skill level has become so specialized that they are no longer employable as scientists or engineers at comparable pay. These employees in essence are trapped at the PTO and thus are particularly in need of protection against any arbitrary and capricious removal. It would be an enormous disincentive to employees to persevere and become primary examiners if they could be removed without cause. Who would be willing to take the risk that years of study and toil to become a primary examiner would pay off if you could be removed from your job at the whim of a supervisor?

Right now, patent examiners are a dedicated, hard-working, highly educated group of scientific professionals, many of whom devote their entire lives to the patent system. Disturb their morale and their confidence that they will be treated fairly, and you may not like the results. You will have devalued the worth of some of your best and brightest federal employees.

Consider how this will impact on the hiring and retention of employees. Although the government, for some individuals, is not the employer of first choice, the PTO has benefited from the layoffs and restructuring of our nation's scientific work force. When this windfall ends, the PTO may not be able to attract the employees needed. The job security and the culture of the civil service system provide the government a competitive advantage, incapable of being matched by private industry. If you eliminate that culture and that job security, how will the PTO compete with private



industry? How will the federal government attract competent employees if the size of a paycheck is the only basis for choosing a job?

Yet, the foregoing is not even the most important reason for retaining employee civil service protections. The most important reason is that the public has the right to know that the power and authority conferred by the public to its government will not be hijacked by unaccountable management personnel carrying out their personal prejudices. Due process requirements for employee discipline and removal, in which management must demonstrate that the alleged poor performance or malfeasance of an employee is real, are what protect the public from corruption of legitimate authority. While it is understandable to want to reduce the burden of regulation, we should remember that these regulations came into being because public outrage demanded remedies to widespread historic abuses. There is no reason to believe that absolute power will no longer corrupt absolutely as we enter the twenty-first century.

Amazingly, the legislation before us provides for removal only for cause for the CEO, but for no one else. Even the patent owners' representative in the first day of your hearings testified that employees deserve the protection of removal only for cause.

Our employees want to have permanent jobs, but without the protections of Chapters 31, 33, and 35 they could be left with only a series of temporary appointments. At the FDIC, I am told, it is commonplace to give certain professionals only 2 year terms. Currently, under OPM regulations, an agency is allowed to use temporary employment only in situations in which there is an expectation of a limited workload, in which a documented request has been submitted to OPM, and OPM has approved its use. OPM has continuing oversight jurisdiction and may revoke permission to continue temporary appointments. Under the proposed bill, there is no administrative oversight of the corporation's use of its appointment authority.

Temporary appointments can be used to undercut an employee's entitlement to health and life insurance. Temporary appointments can also be used to avoid the due process procedures required for removals for cause. In the PTO, 10 examiners with computer science degrees were hired in Group 2300 on a temporary basis because, we were told, it was not clear that individuals with such degrees could successfully perform patent examining duties. Presumably, a refusal to renew the appointments is intended to be used as a substitute for substantiation of an allegation of poor work in a removal action.

Another method of avoiding the due process procedures required for removals for cause is to unduly extend probationary periods. Under current law, an employee is subject to summary dismissal during the probationary period. That means a mere general allegation of poor performance, without a specification of charges and without the opportunity for a hearing, is a sufficient basis for removal. Summary dismissals are not grievable. The proposed bill eliminates the current one year limitation on probationary periods and further specifies that the "procedures" for employment are not negotiable.

Do we want to go back to the days when patronage, nepotism, and cronyism dominated the federal government? Of course not. But consider the following examples of statutes in Title 5 of the U.S.C. from which the new PTO is to be exempted: Section 3303 which prohibits political recommendations regarding hiring promotions and other personnel actions. This section is a key element in the defense against patronage. Or perhaps, Section 3110 which prohibits the employment of, or favored treatment of relatives. Of the eleven categories of prohibited personnel practices specified in Section 2302, only one, dealing with whistle blower protections, is applicable to the employees of a government corporation. A typical prohibited practice not applied to corporate employees is the prohibition against retaliation for testifying on behalf of a fellow employee in a hearing before a government agency or in a grievance proceeding.

PTO employees have earned and deserve their civil service rights. The PTO has been an example of hard work, productivity and efficiency, in stark contrast to the stereotype of unproductive and inefficient government workers. All examiners are subject to a performance evaluation system in which they are fully responsible for quality, quantity and timeliness. Production quotas are specified in six minute increments and many employees already put in lots of voluntary overtime. Surely, it would be contrary to the family values we all share to allow management the untrammelled power to demand even more output, thereby requiring employees to spend more evenings and weekends to meet ever-increasing goals.

In considering the proposed legislation, it is important to assess the impact it is likely to have on the performance of patent examiners. Especially important is the relationship between quality and quantity. For examiners, quality basically means a complete search of the prior art, a thorough and clear exposition of all the legal

issues, and making correct decisions. In the past fifteen years, there has been a relentless drive to increase the productivity of examiners, that is, to decrease the amount of time spent on each case. Each professional puts as much quality into the product as time granted to him by management allows. As the complexity of the technology has expanded, as the size of the search file has expanded, as the complexity of the legal issues has expanded, and as patent procedures have become more complex, there is only one thing that has remained constant—the quota that has been assigned to each examiner.

At this point, the average amount of time spent per application is approximately seventeen hours. How much less time can an examiner spend on a case and still put out a quality decision?

Our customers have been surveyed numerous times, and have been extensively interviewed in focus groups. The number one concern is with the quality of our work product, especially as regards the adequacy of the search of the prior art. Our employees have also been surveyed, most recently by an outside consulting firm that was hired by management as part of the re-engineering efforts at the PTO. The number one problem identified by employees is concern over the quality of our work product. Our examiners are strongly motivated to provide a quality work product by their professionalism and by their pride. Every patent lists the names of the examiners who worked on the case, and no one wants to be embarrassed.

Our customers have spoken. Our employees have spoken. But, nothing has changed. Production and cycle times still take precedence over quality. The prognosis for the future is clear. When we did an additional survey in preparation for today's testimony, our employees again expressed their belief that if PTO management were given the flexibility provided in the proposed bills, there would only be a further squeeze on quality.

Particularly pernicious is the performance agreement, set forth in Section 103 (b)(3)(A) of the administration bill, to be established between the Secretary and the CEO of the Corporation. That agreement is to incorporate "measurable goals in such specific areas as productivity, cycle times, efficiency, cost reduction, innovative ways of delivering patent and trademark services, and customer satisfaction." Conspicuous by its absence is any reference to quality or any measure of the correctness of the patent and trademark decisions that are made.

Our professionals recognize that all of their past hard work will now only serve as the new baseline for a production and performance driven CEO who wants to double his salary so that his income can exceed that of the President and all of Congress.

Employees also recognize that you build quality into a product only with more time and more resources. Currently, the European Patent Office spends about as much time searching a patent application as our examiners spend on the entire prosecution of a case. When inadequate time is available for searching, fewer applicants can be assured that the patents they are granted will stand up in court when assailed by a well financed opponent who is willing to fund a thorough search.

Employees have seen that management is willing, even after hearing from its customers and its employees, to sacrifice quality in the examination process in favor of increasing production and reducing cycle time. Even in light of this expressed concern for quality, management has stated its intention to gut the independent quality review operation, and has severely cut back our patent classification efforts, that is, efforts which allow patents to be indexed in the proper areas so that they can be found when an examiner goes to search for them. Top management's principal goal in the ongoing reengineering efforts is still to decrease cycle times, and to increase productivity, rather than to improve quality.

If Congress is concerned about the quality of the work product, we recommend that you consider the professionalism and the pride of the employees as a resource. The most direct way you can utilize that resource is by providing an additional clause in Section 103 that states:

Notwithstanding the provisions of title 5, USC, Section 7106(a), performance evaluation systems and performance standards shall be proper subjects of negotiation.

Working in partnership with management, we will best be able to increase the quality of our examination process. On the other hand, without an explicit statutory concern for the quality of our work product, only the characteristics listed in the administration bill will be heeded.

Unfortunately, the easiest and quickest way to decrease costs and increase cycle times is simply to do less examination. For example, if we don't classify foreign patents into our U.S. classification system, and then don't put them in our files, we will become more cost effective. Not only will we save the cost of classification, but

there will be fewer references to search. Thus, our examiners will be able to save time in the search. Furthermore, if a relevant reference is missed, they will be able to issue the application instead of having to write a rejection with all its attendant effort and time. Of course, this is not the way to increase quality.

During the first day of hearings on the possible transformation of the PTO, the Administration cited to a 40% reduction in costs at the British Patent Office as a result of converting to a "performance-based" organization. Frankly, this sounded too good to be true; and it turned out not to be true. The British Patent Office did not achieve a 40% reduction in overall costs. It achieved a reduction of that size only in the cost of "common services," which reduction, according to their 1994-95 Annual Report, "derives mostly from accommodation savings following relocation to South Wales." The cost of common services in their fiscal year ending in March of 1995 was only about British pound 12 million in overall expenditures of over British pound 46 million. The British Patent Office moved from leased space in London to mostly government-owned space in Newport, South Wales, a town of only about 110,000 people on the opposite side of the British Isles. This is roughly the equivalent of moving our PIO to the middle of West Virginia.

#### OUR CURRENT SYSTEM WORKS WELL

The Commissioner, in his testimony, stated that he needed greater "flexibility" in pay matters so that he can pay employees more. In particular, he has said that he doesn't want to have to stick a cracker jack biotech examiner in management to pay him more. His lieutenants must not have given him all of the correct information. Under our current system, the agency has lots of flexibility to pay people more including the opportunity to:

- 1) establish special higher pay rates if the basis for the payment is the occupational specialty of the employee;
- 2) provide retention bonuses of up to 25% of yearly salary for employees whose special skills are in particular demand in the private sector;
- 3) provide recruitment bonuses of up to 25% of yearly salary if the agency would otherwise have trouble finding high quality candidates to fill a position;
- 4) provide a relocation bonus of up to 25% of basic pay when it is necessary to recruit outside of the commuting area in order to find a high quality candidate;
- 5) eliminate artificial restrictions on the number of non-managerial GS-15 patent examiner positions;
- 6) establish a senior level pay scale which provides for pay up to level IV of the Executive Schedule for particularly exceptional employees;
- 7) grant award amounts higher than currently paid, including up to 10% of salary for fully successful performance and up to 20% of salary for exceptional performance; and
- 8) provide additional fringe benefits such as transit subsidies. with all these well-established programs for paying employees more money, we cannot imagine what additional flexibility an agency would need to attract a well qualified work force. To the extent the Commissioner wants to pay us more, he should do it now using these existing authorities.

Pay affects employees on a daily basis. Nothing affects morale more than the perception of fairness that is associated with the pay system. Right now we have a system that everyone is comfortable with. The patent examiner series, GS-1224, was a custom designed classification system keyed to the special needs of the examining job. It is a rational structure that provides a progression of salaries from a low of GS-5 to a high of GS-15. We know of no specific inadequacies in that structure.

The National Academy of Public Administration (NAPA) Report on "Incorporating the Patent and Trademark Office" attempts to create a rationale for exempting the Office from portions of title 5. Unfortunately, the rationale is flawed in many instances due to an inaccurate understanding of the factual situation at the PTO. For example, the Report alleges that employees in career ladder positions need only demonstrate satisfactory performance in their current grade to be promoted. If this is true it is only because an agency fails to follow the regulation which requires agencies to establish a systematic means for promotion according to merit. The specific provisions of a promotion plan are left to the discretion of the agency. We cannot imagine any greater flexibility than that. The practice in the PTO is such as to require patent examiners to maintain productivity levels half way between their current level and the next highest level for the six months prior to promotion and demonstrate a likelihood of successful performance at the next highest grade.

The NAPA Report also alleges that some employees reach the top of their career ladder without having achieved any additional education or qualifications other

than those they possessed when entering their career ladder. This is a dreadful slur. Every primary examiner is required to undergo two rigorous reviews of his work by panels of supervisors to determine full competency. Since most primary examiners end up in dockets they learned only during their careers at the PTO and since most employees entered the PTO without knowledge of patent law and practice, it is obvious that they acquired the knowledge and qualifications in the interim.

The NAPA Report also alleges that one of the defects in the pay system is that supervisors, in many instances, are paid less than the employees that they supervise. This usually occurs when an experienced examiner has a relatively newly appointed supervisor. We believe that is a strength in the system and not a defect because it demonstrates that technical expertise and ability in the actual job of an examiner is worthy of reward.

NAPA alleges there are top performing employees who progressed through their grades a year at a time who have morale problems because they are sitting next to a long time patent examiner who is at the top of the grade but has not kept up with the technology and is a mediocre employee at best. We cannot imagine where this information came from; it appears to be pure fantasy. Examiners are like wine. They tend to get better over time due to increased experience. Although in any group of hundreds there may be a few poor performers, the vast, vast majority of examiners at the top of their grade are well respected and serve as resources for the less experienced examiners. We know of no morale problem of the type identified by NAPA.

Currently, the PTO is an integral part of the government in that it receives oversight from OMB, from OPM, and from the Commerce Department. From an employee perspective, the activities of the oversight agencies is critical. Most of the time, individual employees have neither the resources nor the access to information that make it practical to overturn a prohibited action. Even when employees pool their resources, only a few of the most egregious violations can be remedied. It really takes the power and authority of a government agency to effectively police those who themselves have lots of resources and power. None of the proposals provide that kind of oversight.

#### CONTRACTING OUT PATENT EXAMINATION TO FOREIGN GOVERNMENTS

In the proposed legislation, at Section 102, in the amendment to 35 U.S.C. § 2(b)(10), the new PTO is given the power to contract out the entire operation of the organization, including the searching and examination of patent applications, to foreign governments and international organizations. We believe the critical functions of searching and examination must be retained in this country. We urge the Congress not to give the PTO such unfettered power.

Do not think such an extreme possibility is entirely hypothetical. A recent O.G. notice proposed contracting with the European Patent Office for searches in PCT cases in which the United States was specifically designated by the applicant as the search authority. See 1167 OG 74 of October 18, 1994.

While we support cooperative efforts with foreign Patent Offices and with international organizations, the basic functions of searching and examination involve policy matters that determine our competitiveness with both the Europeans and the Japanese. We do not think it is wise to even create the potential for such a loss of control of fundamental, Constitutionally mandated economic policy.

#### BARGAINING RIGHTS

The very severe cutback in bargaining rights provided in both H.R. 1659 and the administration bill devalues the voice of employees in supporting the mission of the agency. H.R. 1659 is worded so as to avoid all bargaining, including impact and implementation bargaining, with respect to the classification of positions, pay matters, and procedures for employment. In fact, H.R. 1659 eliminates all currently existing substantive bargaining, even in areas that Congress has specifically provided for, such as bargaining with respect to flextime and compressed work weeks. The only bargaining that is permitted under this bill is bargaining over procedures that management will observe in exercising the management rights, and appropriate arrangements for employees who are adversely affected by the exercise of management's rights.

The administration bill similarly restricts bargaining although different language is used. By virtue of the fact that subsection (f) of Section 103 states that the Chief Executive Officer shall have, "sole and exclusive discretion" means, under current case law, that all negotiation regarding the listed topics is prohibited. See *AFGE Local 3295 and U.S. Department of the Treasury Office of Thrift Supervision, 47*

FLRA 884 (1993), *affirmed sub nom. AFGE Local 3295 vs. FLRA*, Docket Number 93-1488 (D.C. Cir. January 27, 1995).

Senator Lautenberg's bill, S. 1458, at proposed 35 USC § 3, subsection (h)(2), seems to provide for bargaining of the matters reserved to the sole and exclusive discretion of the Commissioner but, in fact, bars negotiability because of the language that says that these matters are negotiable to the same extent as the Federal Labor Relations Authority holding in effect currently. The relevant FLRA case is the one cited in the prior paragraph of my testimony which holds that the "sole and exclusive discretion" language constitutes Congress' intent to bar negotiability. The potential confusion engendered by this section serves no one.

Even though the Commissioner testified on the first day of hearings that impact and implementation bargaining would be allowed if management made a decision to decrease pay, it is not at all clear that this would be allowed in situations in which Congress has specified that the CEO has "sole and exclusive" discretion.

There is also some confusion as to what is meant by the language in Section 103(f) of the administration bill in which it is stated that the CEO shall have sole and exclusive discretion over "any compensation and award system except gain sharing, including wages and compensation based on performance." Since we believe that compensation based on performance is gain sharing, this section seems to be sufficiently indefinite to be a source of future litigation.

The administration bill adds to H.R. 1659's exclusions an additional direction that the CEO shall have sole and exclusive discretion to "abolish positions and lay off without regard to the provisions of Chapter 35 of Title 5, United States Code except that preference eligibility laws shall apply in any layoff system."

With such broad and unchangeable authority to lay off employees without cause, we cannot imagine that anyone would ever be given an opportunity to defend him or herself. Even if management were to believe there is a proper basis for removal for cause, we cannot imagine any management ever giving an employee an opportunity to be notified of the specifics of the basis for that removal when all that management has to do is send the employee a letter that says one line: "Your position has been abolished as of today." Our contracts with the agency and Title 5 provisions provide significant due process rights to employees who are to be removed for cause. We expect those rights to be entirely irrelevant should the Agency ever achieve, as is proposed in the administration bill, total and unfettered power to lay off employees without any explanation.

All the proposed legislation treats Patent Office employees as third class citizens who are to have fewer collective bargaining rights than employees in the private sector, and fewer collective bargaining rights than employees in the federal sector. What rationale can be used to justify such shabby treatment? We know of no other comparable situation in which Congress has found the need expressly to deny negotiation rights to employees. PTO employees do not perform military, police, medical, sanitation, emergency functions, or functions having an instantaneous impact on public health or safety. What is it about PTO employment that would justify denial of the basic private sector right to collective bargaining?

The bulk of the labor management litigation at the PTO concerns disputes over what is negotiable and what is not negotiable under the management rights clause. When both sides admit the negotiability of a particular topic, we have shown that we can reach a mutually satisfactory agreement in a very short time. One example of that is a gain sharing agreement which we think has benefited management, has benefited the employees, and has benefited the PTO's customers. That particular agreement was reached in approximately three weeks. There are, of course, other topics in which negotiations reached an impasse, and it was necessary to invoke the services of an interest arbitrator to resolve those negotiations. We challenge anyone to find any ill effects for the public or the PTO in those agreements.

The administration bill provides for the establishment of a labor management committee which is limited to an advisory capacity. We believe that the establishment of such a body, whose recommendations can be ignored at will, is not an effective vehicle for providing employee input.

The Commissioner has stated his intention to write a new personnel manual. With no required input from employees with respect to virtually all of the significant aspects of an employee's career, it should be an easy book to write.

#### CONCLUSION

The proposed bill eliminates the underpinnings of the civil service system, while it bars by law collective bargaining as to the most significant aspects of the employment relationship. The result is to place virtually unchecked power in the hands of

the chief executive of the corporation. As written, it would take an act of Congress to reverse a personnel policy.

This discretion can be used for good or evil—will each employee now be expected to negotiate his or her own wages? Will there be any checks to ensure fairness or avoid special privilege?

No CEO in private industry has unchecked power—there is accountability to a board of directors, a fiduciary duty to stockholders, and a statutory requirement to negotiate with labor unions. In the public sector, it is well established that all institutions should be subject to checks and balances.

We urge that the Congress not succumb to an idealized view of private enterprise in attempting to make government agencies operate more like the private sector. The history of private enterprise in this country, while including many shining achievements is also rife with examples of misbehavior, malfeasance, overbilling, fraud, and knowingly selling dangerous products, and the court records of this country bear ample witness to too many such deplorable episodes. While the public may tolerate this situation in the private sector, accepting “after the fact” remedies available in the courts, it should be entitled to a higher standard in the government it establishes by Constitution and statute, so that every effort is made to prevent wrongdoing before it happens.

#### RECOMMENDED ACTION

We recommend, first and foremost, that Congress maintain the status quo with respect to the treatment of employees with regard to their civil service rights and their bargaining rights. What this means, simply, is that the sections of the proposed legislation that exclude employees from key provisions of title 5 and that restrict the scope of bargaining (including the sole and exclusive language in the administration bill) be stricken from the legislation. Some of the witnesses that you heard on the first day of the hearings, recommended that the status quo be maintained with respect to both bargaining and employee rights matters. We think that is good advice.

However, if Congress is concerned about the quality of examination, then, we recommend as the best means for improving quality, a clause which makes performance evaluations and performance standards a proper subject of negotiations.

Mr. MOORHEAD. Yes. Mr. Friedman.

#### STATEMENT OF HOWARD FRIEDMAN, PRESIDENT, THE TRADEMARK SOCIETY, NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 245

Mr. FRIEDMAN. Thank you. Good morning. Mr. Chairman, I appreciate the opportunity to appear before the subcommittee on behalf of the Trademark Society, National Treasury Employees Union, Chapter 245 to present our views on the proposed legislation to make the Patent and Trademark Office a Government Corporation.

Let me take a step back before I go into my testimony, and let me review what I plan to talk about. I plan to talk about four subjects. The bulk of my comments are going to be reserved to detailing why we think that the status quo is not maintained in the labor management relation. And, as I said, that will be where the bulk of where our comments, my comments, will be.

I want to spend a little time also talking about three other subjects and they are: under what circumstances do we think that work should or shouldn't be contracted out? I also want to talk briefly about the issue of what the advisory board, how the advisory board should be configured, and also talk briefly about the management committees that are referred to in the bill. And, finally, I want to address the issue of how trademark fees should be utilized, where they should go, and how the trademark operation and policy function should be managed.

Mr. Chairman, NTEU, Chapter 245, is the labor union that represents attorneys in the trademark operation in the Patent and Trademark Office. Our bargaining unit members decide whether to approve trademark applications for publication and registration. More than 70 percent of our bargaining unit are dues-paying members of our organization. These members, some of whom are here today and sitting behind me, value the importance of union involvement and participation in their work life.

We would like to emphasize that our chapter NTEU is in complete accord with the positions taken before you by the national union and Mr. Tobias. We are grateful to the subcommittee for allowing us to present our special perspective as trademark attorneys on the proposed legislation.

Mr. Chairman, we appreciate the need for creating changes in the Federal sector. There is no question that employees and customers at the Patent and Trademark Office could benefit from a more efficient and cost-effective operation. We, therefore, support the development of a Patent and Trademark Office as a Government Corporation, but only if such development will not decrease the rights and protections of the employees in the Office.

Mr. Chairman, the morale, the integrity, the independence, and the expertise of the Office's trademark attorneys are vital to the successful operation of the Trademark Section of the Patent and Trademark Office. Without proper administration of the laws regarding trademark registrations, the value of the American trademark cannot be preserved. Consequently, Mr. Chairman, it is vital that any legislation to change the Patent and Trademark Office from a Government agency to a Government Corporation embody accountability, oversight, and checks and balances on those managing such a Corporation. The work force must feel empowered to do their jobs without fear of unfair treatment and reprisal.

Mr. Chairman, the best way I know to ensure a productive and efficient Patent and Trademark Office is to make sure that the atmosphere exists to create a true partnership between management and its employees. Private businesses have been extremely successful because they have formed partnerships with union organized employees.

For a partnership to work, however, there must be a balance of power between the parties involved. Traditionally, the labor unions in the Patent and Trademark Office have helped maintain a check on management discretion by advocating for civil service protections and bargaining collectively where appropriate. In the last 2 years, management and its three labor unions have formed a partnership council and signed an agreement which encourages interest based discussion over formal negotiations and litigation. Where collective bargaining has not been available, the employees at the Patent and Trademark Office have enjoyed the protections provided for them by Congress in title 5 of the United States Code.

Mr. Chairman, there has been testimony before this committee urging that the status quo should be maintained in the labor management arena in the proposed Patent and Trademark Corporation. Unfortunately, the proposed legislation does not accomplish that. All of the bills would exempt the Corporation from civil service protections embodied in title 5 without any substitute to check arbi-

trary actions by management. Thus, employees in the corporation would be subject to the whim of a chief executive officer who has been granted unfettered discretion. Layoffs, performance appraisals and appeals, job classifications, and compensation systems are fundamental issues for employees.

These sections of title 5 which have been exempted by the proposed legislation contain some very basic tenets which go to the heart of the Federal labor management relationship. They create an atmosphere of fair play and a structure which protects workers from the arbitrary and capricious actions of an unchecked manager.

Mr. Chairman, you have stated previously that it would be beneficial to make the Government—the PTO a Government Corporation so that it can operate like a business. In any private corporation, however, there are many mechanisms to prevent management from making rash and adverse decisions including shareholders meetings, a board of directors, and oversight by the Securities and Exchange Commission. In addition, the National Labor Relations Act provides employees in the private sector with the right to organize and the right to full collective bargaining over all conditions of employment including pay and benefit.

The right of employees do not need to be limited in order to achieve the goals of the Patent and Trademark Corporation. If it is necessary to provide the Patent and Trademark Corporation additional flexibility to operate without portions of title 5, a simple and yet effective substitute exists to keep management accountable. Simply stated, allow the employees collective bargaining rights over all conditions of employment including wages and benefits.

Mr. Chairman, I'd next like to briefly talk about the second topic I said I would talk about, and that is the issue of contracting out. Some of these comments, I believe, echo what our president of NTEU has said, but I want to go into a little more detail in that regard.

To me, it's almost self-evident that the Patent and Trademark Corporation should be required to expend funds in the most practicable, efficient and cost effective manner. Consequently, we see no need to allow management the right to contract work out for other reasons. Federal employees should be replaced only to save the Corporation time and money. Protecting employees and customers from misuse of funds can only heighten the validity of this legislation. Therefore, we would ask that all bills before this committee be amended to include language that allows contracting out only when it is the most practicable, efficient, and cost effective method of performing work.

The third topic I'd like to briefly address deals with language in the bills regarding advisory board and labor management committees. From my perspective, all avenues for input from customers and employees are advantageous to the operation of any organization. Consequently, we ask that H.R. 1659 be amended to provide seats for representatives of the labor organizations on the advisory board. We also support labor management committees as required by H.R. 2533.



The fourth and final topic, Mr. Chairman, that I'd like to speak about, deals with how we would recommend the—your distinguished committee handling trademark funds and management through legislation. Although trademark applications represent over 45 percent of the patent and trademark applications filed at the Patent and Trademark Office, the trademark operation employees only about 8 percent of the total employees at the Office. Because the trademark employees are a small part of a much larger operation, we are often considered an afterthought. The different ratios between the application filings and employees requires the trademark operation business practices to be different from the patent operation business practices. Moreover, the training of and qualifications for trademark attorneys differ remarkably from those of patent examiners. The small, collegial staff of the trademark operation lends itself to a different management approach as well as different allocations in management resources.

The financial success of the trademark operations should continue to remain in trademarks to enhance trademark customer service. Therefore, we support the language in the bills which would fence trademark user fees for only in trademark operations.

Additionally, it is also important that trademark policymakers and management be knowledgeable in trademark law. It would be very useful to maintain policy and management functions within the trademark operation and maintain these functions separately from the patents side of the house. S. 1458, Senator Lautenberg's bill, appears to be the preferable approach in this regard.

In conclusion, Mr. Chairman, Chapter 245 of the National Treasury Employees Union is supportive of a Patent and Trademark Corporation if the Corporation can maintain and enhance the rights of its employees. Protection of their rights is paramount to the success of any legislation to change the Patent and Trademark Office.

Again, as the red light comes on, I'd like to thank the chairman and the subcommittee for the chance to present our chapter's views. Mr. Chairman, please rest assured that we are prepared to work with you in any way we can to help foster the goals of better service to the American people.

Thank you.

[The prepared statement of Mr. Friedman follows:]

PREPARED STATEMENT OF HOWARD FRIEDMAN, PRESIDENT, THE TRADEMARK SOCIETY,  
NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 245

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before the Subcommittee today on behalf of the Trademark Society, National Treasury Employees Union, Chapter 245, to present our position on H.R. 1659, the Patent and Trademark Office Corporation Act of 1995; H.R. 2533, the United States Intellectual Property Organization Act of 1995; and S. 1458, the Patent and Trademark Office Reform Act of 1995.

The Trademark Society, National Treasury Employees Union, Chapter 245, is the labor union that represents the professionals in the Trademark operation of the Patent and Trademark Office. More than seventy percent of our bargaining unit are dues paying members of our organization. These members value the importance of union involvement and participation in their work life.

We would like to emphasize that our chapter of the National Treasury Employees Union is in complete accord with the positions taken before you by our national union. We are grateful to the Subcommittee for allowing us to present our special perspective as trademark; attorneys on the proposed legislation.

We understand and appreciate the need for creating change in the federal sector. There is no question that the employees and customers of the Patent and Trademark Office could benefit from a more efficient and cost effective operation. Personnel ceilings, space allocation and procurement requirements, and the surcharge on patent user fees have placed significant burdens on the Office. We, therefore, support the development of the Patent and Trademark Office as a government corporation, but only if such development will not decrease the rights and protections of the employees in the Office. The employees make the Office successful and their cooperation and satisfaction are necessary components of any successful change in the operation of the Office.

#### SIGNIFICANCE OF TRADEMARK REGISTRATION

Mr. Chairman, the American public and business community place great importance on the registration of trademarks in the United States as a key to the protection of valuable intellectual property rights. Trademark applications in the Patent and Trademark Office have increased substantially in recent years. This past fiscal year alone, applications have increased by twelve percent. Valid trademark registrations are necessary to enforcing counterfeiting laws, preventing infringement of trademarks and maintaining consumer confidence in the quality of American business products and services.

#### IMPORTANCE OF THE PROTECTION OF TRADEMARK EMPLOYEES

Our bargaining unit members are the attorneys in the Trademark Examining Groups of the Patent and Trademark Office who decide whether to approve trademark applications for publication and registration, and the interlocutory attorneys at the Trademark Trial and Appeal Board, who decide motions in *inter partes* matters before the Board. The examining attorneys are the first line decision makers in the trademark registration process. The trademark attorneys in the Office are highly qualified professionals who have chosen a career in government service in spite of the financial attractions of the private sector. We have attracted attorneys from the country's top law firms and law schools. The morale, the integrity, the independence, and the expertise of the Office's trademark attorneys are vital to the successful operation of the Trademark section of the Patent and Trademark Office. Without proper administration of the laws regarding trademark registrations, the value of the American Trademark cannot be preserved.

Consequently, Mr. Chairman, it is vital that any legislation to change the Patent and Trademark Office from a government agency to a government corporation embody accountability, oversight, and checks and balances on those managing such a corporation. The ability of the employees to successfully exercise their judgment, produce a quality product, and satisfy the needs of their customers must not be compromised. The workforce must feel empowered to do their jobs without fear of unfair treatment and reprisal.

We owe it to the Trademark customers to create a Trademark operation that comprises one of the most prestigious trademark law offices in the country. Yet the only way that the federal government can compete with the private bar in attracting and retaining the best attorneys is to provide working conditions and benefits that allow for a high quality of life doing meaningful work.

The best way to ensure a productive and efficient Patent and Trademark Office is to make sure that the atmosphere exists to create a true partnership between management and its employees. Through partnership, solutions to the pressing problems facing the Office can be crafted in the most cost-effective manner. Private businesses have been extremely successful because they have formed partnerships with union organized employees. Saturn and Levi Straus are just two examples of such corporations.

For partnership to work, however, there must be a true balance of power between the parties involved.

#### CURRENT STATUS OF LABOR RELATIONS

Traditionally, the labor unions in the Patent and Trademark Office have helped maintain a check on management discretion by advocating for civil service protections and bargaining collectively where appropriate. In the last two years, management and its three labor unions have formed a partnership council and signed an agreement which encourages interest based discussion over formal negotiation procedures and litigation.

Where collective bargaining has not been available, the employees at the Patent and Trademark Office have enjoyed the protections provided for them by Congress

in Title 5 of the United States Code. The employees are protected from political interference, patronage, and arbitrary and capricious actions by management.

#### CHANGING THE STATUS QUO

There has been testimony before this committee urging that the status quo should be maintained in the labor-management arena in the proposed Patent and Trademark Corporation. Unfortunately, H.R. 1659, H.R. 2533, and S. 1458 do not accomplish that. All three bills would exempt the corporation from the civil service protections embodied in Title 5 without any substitute to check arbitrary actions by management. Thus, employees in the corporation would be subject to the whim of a Chief Executive Officer who has been granted unfettered discretion.

Both H.R. 1659 and H.R. 2533, as well as S. 1458, would exempt the proposed corporation from certain provisions of Title 5 of the United States Code, specifically Chapters 31, 33, 35, 43, 45 (except for S. 1458, which doesn't exempt Chapter 45), 51 and Subchapter 3 of Chapter 53. These statutes, however, contain some very basic tenets which go to the heart of the federal labor-management relationship. They create an atmosphere of fair play and a structure which protects workers from the arbitrary and capricious actions of an unchecked manager.

For example, provisions in Chapter 33 restrict nepotism (5 USC 3319) and allow for appointment of work details (5 USC 3345-3347). Chapter 35 prescribes rules for retention rights during layoffs, mandating management to consider employment tenure, military preference, length of service and performance ratings (5 USC 3502 *et seq.*), and mandates restoration of employment for those ordered to active duty in the Reserves or National Guard (5 USC 3551). Chapter 41 requires each agency to report and evaluate employee training programs (5 USC 4118). Chapter 43 sets up a scheme for measuring employee performance, requires notice to employees of performance requirements and promotes a fair appraisal system (5 USC 4301 *et seq.*). It establishes procedures for impartial reviews of ratings, as well as appeals and inspection of performance appraisal plans by the Civil Service Commission. Chapter 45 deals with incentive awards. Chapter 51 legislates a job classification scheme, setting standards for job classifications (5 USC 5105) and setting up a review of classification of positions (5 USC 5110). Its purpose is to ensure that the principle of equal pay for substantially equal work will be followed and that pay will be in proportion to difficulty, responsibility and work qualification requirements (5 USC 5101). It allows the Office of Personnel Management to require an agency to conform with the standards of job classification in the chapter and change a position from one class or grade to another when warranted (5 USC 5112). Subchapter 3 of Chapter 53 not only sets up the general schedule of pay rates but it also sets up a structure for step increases (5 USC 5331 *et seq.*).

Layoffs, performance appraisals and appeals, job classification, and compensation systems are fundamental issues for employees. These sections of Title 5, which have been exempted by H.R. 1659, H.R. 2533, and S. 1458, mandate important tenets of equity and fairness that are fundamental to the employer-employee relationship.

Another diminution of employee rights is put forth in H.R. 1659 Section 3(g). This section appears to limit rights to impact and implementation bargaining in some of the areas of working conditions available currently under Chapter 71 of Title 5.

Mr. Chairman, you have stated in your opening remarks that it would be beneficial to make the PTO a government corporation so that it can operate more like a business. In any private corporation, however, there are many mechanisms to hinder management from making rash and adverse decisions. Shareholders' meetings, a board of directors and oversight by the Securities and Exchange Commission provide a structure against unfettered management discretion. In addition, the National Labor Relations Act provides employees in the private sector with the right to organize and the right to full collective bargaining over all conditions of employment, including pay and benefits.

The rights of employees do not need to be limited in order to achieve the goals of the Patent and Trademark Corporation. If it is necessary to provide the Patent and Trademark Corporation additional flexibility to operate without the constraints of portions of Title 5, a simple yet effective substitute exists to keep management accountable. Simply stated, allow the employees collective bargaining rights over all conditions of employment, including wages and benefits.

#### CONTRACTING OUT

It is almost axiomatic to state that a Patent and Trademark Corporation should be required to expend funds in the most practicable, efficient and cost effective manner. Consequently, we see no need for the flexibility to allow management the right to contract out work; for other reasons. Federal employees should be replaced only

to save the Corporation time and money. Protecting employees and customers from misuse of funds can only heighten the validity of this legislation. Therefore, we would ask that all the bills before this committee be amended to include language that allows contracting out only when it is the most practicable, efficient and cost effective method of performing work.

#### ADVISORY BOARD AND LABOR-MANAGEMENT COMMITTEE

All avenues for input from customers and employees are advantageous to the operation of any organization. Consequently, we ask that H.R. 1659 be amended to provide seats for representatives of the labor organizations on the Advisory Board. We also support labor-management committees as required by H.R. 2533.

#### SEPARATE TRADEMARK FUNDS AND MANAGEMENT

Although trademark applications represent over 45 percent of the patent and trademark applications filed at the Patent and Trademark Office, the Trademark operation employs only about eight percent of the total employees of the Office. Because the Trademark employees are a small part of a much larger operation, we are often considered an afterthought.

The different ratios between application filings and employees require the Trademark operation business practices to be different from the Patent operation business practices. Moreover, although also a type of intellectual property, trademarks are not patents. The training of, and qualifications for, trademark attorneys differ markedly from those of patent examiners. The small collegial staff of the Trademark operation tends itself to a different management approach as well as different choices in allocations of resources. The financial success of the Trademark operation should continue to remain in Trademarks to enhance Trademark customer service. Therefore, we support the language in H.R. 1659, H.R. 2533, and S. 1458 which would fence trademark users' fees for use only in Trademark operations.

It is also important that trademark policy makers and managers be knowledgeable in trademark law. To the extent possible, it would be useful to maintain policy and management functions within the Trademark operation and maintain these functions separately from the Patent side of the house. S. 1458 appears to be the preferable approach in this regard.

#### CONCLUSION

Chapter 245 of the National Treasury Employees Union is supportive of a Patent and Trademark Corporation if said corporation can maintain and enhance the rights of employees. The success or failure of a Patent and Trademark Corporation is dependent on its employees. Protection of their rights is paramount to the success of any legislation to change the Patent and Trademark Office.

Again, I would like to thank the Chairman and the Subcommittee for the chance to present our chapter's views. We are prepared to work with you in any way we can to help foster the goals of better service to the American people.

Mr. MOORHEAD. Mr. Friedman, would you change places with Ms. Simmons-Gill, so that she can have the microphone?

Mr. FRIEDMAN. I would be delighted.

Mr. MOORHEAD. A little room for her testimony.

#### STATEMENT OF CATHERINE SIMMONS-GILL, PRESIDENT, INTERNATIONAL TRADEMARK ASSOCIATION

Ms. SIMMONS-GILL. Thank you, Mr. Chairman.

As you know, I am president of the International Trademark Association, and it appreciates the opportunity to appear before the subcommittee today to present its views on the various proposals relating to the reorganization of the U.S. Patent and Trademark Office. Like all of the other members of the INTA, I am a volunteer.

In your opening remarks this morning, you noted your concern about the PTO being treated as a sort of second class citizen of the Commerce Department because of its relatively small size. In my remarks this morning on behalf of INTA, I would like to speak, as

Mr. Friedman has, about the second class citizenry of the trademark operation and trademark applicants and trademark owners in the entire overall structure of the Patent and Trademark Office.

Mr. MOORHEAD. You're at least cousins, though. [Laughter.]

Ms. SIMMONS-GILL. As you know, and you appreciate because of all your work in this area, trademarks are of major importance to a healthy growing economy. Absent legal recognition of and protection for trademarks, business would have little incentive to invest the resources necessary to provide consumers with quality goods and services, and consumers would be unable to easily differentiate among competing products.

For many companies, their trademark is their most valuable asset. The Coca-Cola mark, for example, is valued at \$39 billion. The cover of the March 4, 1996, *Fortune* says it all; "The Verdict: Brands Rule." And there is a lengthy article about the value of brands and a listing of the 10 or 12 most significant brands in the United States, and it details their economic value.

American business relies heavily on the PTO with respect to the agency's administration of the Federal trademark registration process. The registration system serves the public interest by producing a record accessible to the public of the world essentially of new trademark activity, to facilitate the clearance of new marks for use, determine the registrability of proposed marks, and avoid conflicts with the rights of others. An efficiently run PTO is also essential for American competitiveness abroad.

In view of the importance of the Federal registration system to trademarks, it is essential that the PTO's public notice and trademark examination functions be performed promptly and accurately. As you know, since 1982, the users of the trademark system have paid 100 percent of the costs of the trademark operations of the PTO. Not one cent of the general taxpayer money goes to fund the PTO's trademark operations.

In return, Congress directed the PTO to issue an initial determination on the registrability of a mark within 3 months of filing and set an average overall pendency goal of 13 months from filing of the application to registration or abandonment. Unfortunately, these pendency goals are not currently being met. The average pendency to issuance of an initial determination on registrability is now in excess of 6 months. Within the recent past, it has taken almost 3 months simply to get an application from the trademark operations mailroom to the examiners.

Some of the problems faced by the trademark operations, Mr. Chairman, may be traced to governmentwide laws and regulations that make little sense for an agency that is 100 percent user fee funded and whose workload is driven by external forces; i.e., the number of applications.

Some of the problems, however, are organizational in nature and have their root, we believe, in the fact that the trademark operation is a relatively small portion of the Patent and Trademark Office. An inability of the head of trademark operations—in this case, the Assistant Commissioner for Trademarks—to set policy matters that directly impact on the operations such as labor management, personnel and budget, and automation issues separate and apart from the Office as a whole.

The International Trademark Association has carefully reviewed the pending proposals that would create the PTO as a Government Corporation. We believe, Mr. Chairman, that the bill introduced by you and Representative Schroeder, H.R. 1659, the Patent and Trademark Office Corporation Act of 1995, would, if enacted, represent a substantial step forward in the administration of trademark operations. We believe, however, that from the perspective of trademark owners, and their place in the world economy, that the bill does not go far enough. We believe that the time is right for creating a separate, independent Trademark Office, perhaps even as a model or a pilot.

There are a number of considerations that support the creation of a separate trademark office. As noted earlier, the trademark operations represent a relatively small percentage of the PTO, approximately 10 percent, and as mentioned, approximately 8 percent of the professional employees. As a result, the concerns and priorities of the trademark operations, whether with respect to personnel, automation, legislation, or other factors are virtually always overshadowed by the concerns and priorities of the much larger patent operations. Our prepared statement provides some specific examples as to how this operational reality has impacted negatively on trademark operations. So I will not dwell on the particulars at this time. Suffice it to say, that in our opinion, the current merger of patents and trademarks in a single agency does not serve the public interest in ensuring an effective and efficient Federal trademark system.

Now some may contend that the trademark operations is too small to stand on its own, but that is not true. With a yearly budget of around \$50 million, all funded by user fees, and about 500 employees, the trademark operation is already larger than many existing agencies and government corporations. And if we look at the U.S. corporate model, it is a perfect prototype to be a standalone financial unit with supervised policy supervision. And given the projected trends in trademark application filings, and the fact that trademark operations is entirely user fee funded, the future financial integrity of any separate trademark office would be assured.

We also wish to emphasize that the creation of a separate office will not require any fee increases. The business plan attached to our prepared statement shows that, even assuming a separate trademark office would incur some increased costs for computer equipment, administration and space, the office would still have a net surplus of almost \$9.5 million. Further, and most importantly over the long term, INTA believes that a separate trademark would result in a substantially more cost-efficient and effective trademark operation.

INTA has drafted proposed legislation to establish an independent Trademark Office and respectfully requests that its proposal be given serious consideration by this subcommittee during its deliberations on how best to reorganize the PTO. Our bill, Mr. Chairman, is modeled after H.R. 1659. It would establish a separate U.S. Trademark Office as a Government Corporation independent of the Department of Commerce; a Commissioner of Trademarks would be appointed by the President with the advice and consent of the Sen-

ate for a term of 6 years. The Commissioner would have responsibility for all governmentwide trademark policy and operational matters. A nine-member management advisory board would be assumed to provide oversight and guidance to the agency, and our assumption, like yours, is that its members would come from industry and the Government, and we have even suggested that one member be an employee of the Trademark Office.

The bill would provide the Trademark Office flexibility in employee compensation, personnel policy, contracting and management of office space. Its provision on these subjects mirror those found in H.R. 1659. Trademark fees would continue to be set administratively, subject to fluctuation in the consumer price index and public notice and comment. The agency would have borrowing authority to cover certain capital expenses.

We believe, Mr. Chairman, that our proposal would result in a Trademark Office that is more responsive and more accountable to the user community and particularly more effective in serving the rights of trademark owners in an increasingly competitive global economy. In turn, business can be expected to develop greater confidence and loyalty in the Office and help support and nourish it. The result, we believe, will be a Trademark Office that will offer more cost-efficient and quality service, a Trademark Office we can all be proud of.

Thank you very much, and I would be pleased to answer any questions.

[The prepared statement of Ms. Simmons-Gill follows:]

PREPARED STATEMENT OF CATHERINE SIMMONS-GILL, PRESIDENT, INTERNATIONAL TRADEMARK ASSOCIATION

Mr. Chairman and Members of the Subcommittee, The International Trademark Association (INTA) appreciates the opportunity to appear before the Subcommittee today to present its views on various proposals relating to the reorganization of the U.S. Patent and Trademark Office (PTO). My name is Catherine Simmons-Gill, and I currently serve as President and Chairperson of the Board of INTA. As with all INTA officers, board members and committee chairs, I serve on a voluntary basis.

INTA is a 117-year-old not-for-profit membership organization. Its membership has grown from twelve New York-based manufacturers to over 3,000 corporations, package design firms, and professional associations in the United States and in over 100 countries. Our members cross all industry lines, spanning a broad range of manufacturing, retail and service operations. They include small and large businesses as well as general practice and intellectual property law firms. INTA's members, 85 of whom are U.S.-based, own the majority of America's well-known trademarks as well as a substantial portion of all trademarks registered in the PTO.

As we know you appreciate, Mr. Chairman, trademarks are of major importance to a healthy and growing economy. Absent legal recognition of, and protection for, trademarks, business would have little incentive to invest the resources necessary to provide consumers with quality goods and services and consumers would be unable to easily differentiate among competing products. As the U.S. Supreme Court commented in *Park 'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985):

Because trademarks desirably promote competition and the maintenance of product quality, Congress determined that "a sound public policy requires that trademarks should receive nationally the greatest protection that can be given them."

For many companies, Mr. Chairman, their trademark is their most valuable asset. In a 1995 study published in *Financial World*, for example, the "Coca-Cola" mark was valued at \$39 billion; the "Microsoft" mark at \$11.7 billion, and the "Kodak" mark at \$11.6 billion. The Coca-Cola, Kodak, and Microsoft companies are all members of INTA. An article entitled "The Brand's the Thing," published in the March 4, 1996, issue of *Fortune*, notes that executives at Coca-Cola like to say that "if the place was, God forbid, obliterated off the face of the earth—blot to, no more bricks

and mortar—they could walk right over to the bank and borrow \$100 billion and rebuild Coca-Cola in a matter of months, just on the strength of the brand.”

American business relies heavily upon the PTO with respect to the agency's administration of the federal trademark registration process. The registration system serves the public interest by producing a record, accessible to the public, of new trademark activity to facilitate the clearance of new marks for use, determine the registrability of proposed marks, and avoid conflicts with the rights of others. The issuance of a trademark registration by the PTO confers upon the registrant valuable legal rights, including a presumption that it is entitled to exclusive nationwide use of the mark as registered.

The grant of a federal registration also has important consequences with respect to protection of U.S. company-owned marks abroad. In many instances, for example, the U.S. company's ability to obtain trademark protection in a foreign country is dependent upon the issuance of a U.S. registration. Thus, an efficiently run PTO is essential for American competitiveness abroad.

In view of the importance of the federal registration system, it is essential that the PTO's public notice and trademark examination functions be performed promptly and accurately. As you know, since 1982, the users of the trademark system have paid 100 of the costs of the Trademark Operations of the PTO. *Not one cent of general taxpayer money goes to fund the PTO's Trademark Operations.* In return, Congress directed the PTO to issue an initial determination on the registrability of a mark within three months of filing and set an average overall pendency goal of 13 months from filing of the application to registration or abandonment.

Unfortunately, Congress's desires have not always been realized. Despite the fact that the Trademark Operations has been funded entirely through user fees for over a decade, the operation has been beset by numerous problems that have had adverse consequences on U.S. business and consumers. For example, as of January 31, 1996, the average pendency to issuance of an initial determination on registrability was 6.2 months and overall pendency to registration or abandonment was 16.4 months. This far exceeds the so-called “ $\frac{3}{13}$ ” pendency goals set by Congress. Within the recent past, it was taking almost three months just to get an application from the Trademark Operations mail room to the Examiners! The backlog in the Post-Registration Unit also far exceeds goals.

While the number of new trademark applications increases steadily, the Trademark Operations is unable to increase the number of examiners by a proportionate amount, despite a surplus of about \$18 million in the Operations' fee account and despite the fact that no general taxpayer money goes into the running of the Trademark Operations.

Further, the trademark automation effort has taken far too long and has cost far too much. Examiners still are unable to conduct searches from their desks, a capability which would do much to improve productivity and pendency.

Some of the problems faced by the Trademark Operations, Mr. Chairman, may be traced to government-wide laws and regulations that make little sense for an agency that is 100% user-fee funded and whose workload is driven by external forces. Some of the problems, however, are organizational in nature and have their root in the fact that the Trademark Operations is a relatively small portion of the PTO and in the inability of the head of the Trademark Operations—the Assistant Commissioner for Trademarks—to set policy on matters that directly impact on the operation, such as labor-management, personnel and budget, and automation issues.

INTA has carefully reviewed the pending proposals that would create the PTO as a government corporation. As you know, Mr. Chairman, this is not an entirely new idea. For several years now, since a 1989 report by the National Academy of Public Administration (NAPA), there has been considerable discussion and debate within the intellectual property community regarding the government corporation concept. Following publication of the NAPA report, INTA established a Government Corporation Group to review the issue. While taking no position on the merits of the question, at that time the Group reported that there were no constitutional or other impediments to converting the PTO into a government corporation.

When this issue resurfaced last year, INTA established a Task Force to re-examine whether conversion of the PTO into a government corporation would best serve the interests of the trademark community and to review and comment upon the pending proposals. We believe, Mr. Chairman, that the bill introduced by yourself and Representative Schroeder, H.R. 1659, the “Patent and Trademark Office Corporation Act of 1995,” would, if enacted, represent a step forward in the administration of the Trademark Operations. We commend you and Representative Schroeder for introducing this far-reaching and innovative bill.



We wish to emphasize, however, that INTA is not taking a position on any proposal that would dismantle the Department of Commerce per se. Our only interest is the improved performance of the Trademark Operations.

To accomplish this objective, we believe that the Trademark Operations must have the freedom to determine the goals and policies that work best for it and be responsive and accountable to its customers. The Trademark Operations needs to have the flexibility to respond quickly to changing requirements and to experiment with new workplace procedures. It must also have the means to assure a trained and motivated work force that is compensated and treated fairly.

In our view, the above goals can best be met by separating patents and trademarks into two distinct entities and by creating an independent Trademark Office. INTA believes that the merger of patents and trademarks into a single governmental agency, whatever its legal status, no longer serves the public interest. While both patents and trademarks fall under the broad rubric of intellectual property, the similarity ends there.

As you know, Mr. Chairman, the constitutional bases of these two forms of intellectual property are different. While the grant of patents is based on that clause of the Constitution vesting in Congress the power to "promote the progress of science and the useful arts," the federal registration of trademarks is based on Congresses power to regulate interstate commerce. Indeed, the first federal Trademark Act was declared unconstitutional by the Supreme Court on the ground that Congress does not have the power under the "patent and copyright clause" of the Constitution to regulate trademarks. Significantly, the Court said that trademarks have no relation to invention and discovery as a trademark is "simply founded on priority of appropriation." See *Trade-Mark Cases*, 100 U.S. 82 (1879). Further, the objectives of the patent and trademark laws differ. The patent statute is designed to advance technological progress through the public disclosure of new and useful inventions. The trademark laws are designed to promote the national economy by encouraging the production of quality products and reducing the costs to consumers of making purchasing decisions. We question whether it makes sense to vest in one agency responsibility for administering laws whose focus and purpose are so different.

There are other, more practical, considerations that support creation of a separate Trademark Office. As a result of the fact that the Trademark Operations comprises only about 10% of the total budget of the PTO, the concerns of the Trademark Operations and of trademark owners often take a backseat to the concerns of the patent side of the agency. Because of the disparity of the size of the Trademark Operations vis-a-vis the Patent Operations, PTO policies are virtually always geared to what is in the best interests of the Patent Operations. This "one size fits all" mentality has impacted negatively on the PTO's Trademark Operations. This operational reality persists even though the Trademark Operations receives approximately 40% of all applications filed with the PTO and despite the importance of the federal trademark registration process to the national economy and consumers. For example, while the technology currently exists to enable the PTO to accept the electronic filing of trademark applications, which would be of immense benefit to the office and to the trademark community, INTA understands that this initiative has been put on "hold" due to technical difficulties relating to the electronic filing of patents. We don't think this serves the public interest. We also understand that it is often difficult for Trademark management to secure the cooperation of the PTO's Automation staff. Patent initiatives always seem to take precedent. Since the Patent Operations pays 90% of the Automation budget, this should not be surprising.

With regard to labor and personnel issues, the desire of the management of the Trademark Operations to implement innovative programs in such areas as part-time employment and work-at-home are frequently stymied by PTO management. Given the disparity in the relative sizes of the trademark and patent examining corps and in the professional backgrounds of trademark and patent examiners, it is often difficult to reach consensus within the PTO, as a whole, on labor and personnel issues.

In this regard, Mr. Chairman, it is important to note that all trademark examiners are attorneys, most of whom possess liberal arts backgrounds. Very few patent examiners are attorneys; most are engineers or scientists by training. This results in a clash of cultures within the PTO. There is virtually no interaction between Patent and Trademark personnel and there are relatively few efficiencies gained from combining the two examining corps in one agency. A trademark examiner cannot examine a patent application and a patent examiner cannot examine a trademark application.

The reality is that the Trademark Operations is a "second class" citizen within the PTO. We wish to emphasize that this fact is not the fault of any individuals but simply the inevitable result of the disparity in size of the Trademark and Patent

Operations. We also wish to emphasize, however, that trademarks are no less important than patents from the standpoint of international competitiveness; indeed, in many instances involving, for example, consumer goods like "Levi's" jeans, trademarks are more important than patents.

While the Trademark Operations may only represent 10% of the PTO budget, it is large enough to function independent of Patents. With a yearly budget of around \$50 million, all funded by user fees, and about 500 employees, the Trademark Operations is already larger than many existing agencies and government corporations. Given projected trends in application filings (i.e., application filings are up 12% this year over last) and the fact that the Trademark Operations is entirely user-fee funded, the future financial integrity of any separate Trademark Office is assured. Indeed, as previously noted, the Trademark fee account has a healthy surplus. Unfortunately, due to government-wide policies restricting the hiring of new employees, this surplus cannot now be spent in an effort to reduce the current backlog in the examination of applications.

The creation of a separate Trademark Office will not require any fee increases. The attached Trademark Office Business Plan (see Attachment "A") shows that, even assuming a separate Trademark Office would incur increased costs for computer equipment, administrative staff, and space, the office would still have a net surplus of almost \$9.5 million in 1996. Further, and most importantly, over the long-term, INTA believes that a separate Trademark Office would result in a much more cost-efficient and effective trademark operation, thereby providing significant savings to trademark owners. For this reason, the trademark community supports the creation of a separate Trademark Office even at the cost of some short-term inefficiencies. If making the PTO independent of the Department of Commerce will result in operational efficiencies and improved performance, so too will a separate Trademark Office result in improved performance.

INTA believes the time is right for the creation of a new, independent U.S. Trademark Office and has drafted proposed legislation to that end. We respectfully request that our proposal be given serious consideration by the Subcommittee during its deliberations on how best to reorganize the PTO.

Our bill, Mr. Chairman, is modeled after H.R. 1659. It would establish a separate U.S. Trademark Office as a government corporation independent of the Department of Commerce. A Commissioner of Trademarks would be appointed by the President, with the advice and consent of the Senate, for a term of six years. The Commissioner would have responsibility for all government-wide trademark policy and operational matters.

A nine member Management Advisory Board would be formed to provide oversight and guidance to the agency. Eight members of this Board would be appointed by the President and one member would be elected by the employees of the Trademark Office. In our view, the creation of such a board is essential, given that the Office will continue to be funded entirely by user fees.

The bill would provide the Trademark Office flexibility in employee compensation, personnel policy, contracting, and management of office space. Its provisions on these subjects mirror those found in H.R. 1659. Trademark fees would continue to be set administratively, subject to fluctuations in the Consumer Price Index and public notice and comment. The agency would have borrowing authority to cover certain capital expenses.

In addition to long term savings and greater operational efficiencies, we believe that creation of a separate U.S. Trademark Office would also give rise to a greater sense of professionalism within the office. This would, hopefully, help reduce turnover and result in improved quality and customer service.

We believe, Mr. Chairman, that our proposal would result in a Trademark Office that is more responsive and more accountable to the user community. In turn, the user community can be expected to develop greater confidence and loyalty in the office and to help support and nourish it. The upshot, we believe, will be a Trademark Office that will offer more cost-efficient and quality service. In fact, we believe that the Trademark Office can be a model for all of government.

Absent creation of a separate government corporation for the Trademark Operations, INTA suggests that H.R. 1659 be amended to provide the Trademark Operations with operational autonomy within an overall PTO corporation. We believe it is possible to structure the corporation to consist of two autonomous entities, one headed by a Commissioner of Patents and the other headed by a Commissioner of Trademarks. Each Commissioner would be responsible for all aspects of the corporation's patent or trademark activities and each could pursue separate policies on such matters as labor management relations. This would lead to some healthy competition between the two entities that could spur improved performance by both.

We also believe strongly that, assuming the Trademark Operations remains part of an overall PTO, it should have its own Management Advisory Board structured as set forth in our proposal. This would provide a structure to enable the trademark user community to influence developments within the Trademark Operations. Having several seats on a much larger PTO-wide Advisory Board does not provide the necessary guarantee that the views of those who pay for the Trademark Operations will be understood and taken into account in the setting of trademark policy.

We also urge the Subcommittee to amend H.R. 1659's audit provisions so as to enable the Management Advisory Board(s) to select the independent certified public accountant that will audit the financial statements and to provide that, at least once every three years, the scope of the audit include a review of the Office's fees and fee structure.

Finally, assuming Congress decides, at this point in time, not to create a separate Trademark Office, INTA requests that Congress authorize the National Academy of Public Administration to conduct a study and prepare a report within a time certain on the desirability of creating a separate Trademark Office.

#### CONCLUSION

INTA believes that the creation of a separate U.S. Trademark Office as a government corporation would be consistent with the guiding tenets behind the Administration's efforts to reinvent government and with the philosophy of bringing government closer to those it serves. It will advance the public interest by assuring the prompt delivery of quality services to the user community and provide the organizational structure necessary for the corporation to meet the challenges of the twenty-first century.

We look forward to working with members of the Subcommittee and staff in an effort to accomplish these important goals and objectives.

**TRADEMARK OFFICE  
BUSINESS PLAN**

	1991	1992	1993	1994	1995	1996	Notes
<b>Trademark Fees</b>	\$33,071	\$37,559	\$46,710	\$51,089	\$70,347	\$70,400	
<b>Trademark Proposals</b>							
Examination	\$23,790	\$23,850	\$23,894	\$26,342	\$29,860	\$31,353	
Examination Automation	\$2,304	\$3,749	\$4,305	\$4,431	\$3,747	\$4,064	
Trial & Appeal Board	\$2,078	\$2,385	\$2,847	\$2,009	\$3,180	\$3,338	
Printing	\$965	\$1,513	\$1,364	\$1,458	\$2,391	\$2,510	
Quality Review	\$382	\$403	\$423	\$442	\$509	\$535	
Sub-B Trademark Process	\$29,548	\$31,900	\$32,433	\$35,857	\$39,687	\$41,801	Includes \$130 for additional TM Automation staff.
<b>Information Dissemination</b>							
Application Services	\$1,011	\$508	\$727	\$651	\$301	\$518	Includes \$200 for additional staff.
Customer Service	\$1,892	\$2,199	\$2,972	\$2,634	\$2,171	\$3,419	Includes \$1,140 for additional staff, equipment & contracts.
Publication Services	\$188	\$118	\$132	\$141	\$48	\$125	Includes \$75 for additional copy staff and publications review staff
Sub-B Information Dissemination	\$2,871	\$2,915	\$3,831	\$3,438	\$2,520	\$4,081	
<b>Executive Direction &amp; Administration</b>							
Commissioner	\$68	\$77	\$91	\$132	\$131	\$332	Includes \$195 for additional staff in Commissioner's office
Solicitor	\$35	\$35	\$41	\$290	\$231	\$327	Includes \$85 for additional legal representation.
Legislation & International Affairs	\$171	\$201	\$189	\$260	\$283	\$276	
Management Planning	\$449	\$1,171	\$1,176	\$2,056	\$2,053	\$2,507	Includes additional 20% for stand alone business needs.
Administrative Services	\$514	\$456	\$392	\$530	\$501	\$506	
Automation	\$2,243	\$2,172	\$2,239	\$2,244	\$2,901	\$4,570	Includes \$1,523 for stand-alone mainframe, staff and networks
Space Acquisition & Management	\$3,680	\$4,807	\$4,931	\$5,013	\$4,921	\$6,159	Includes 25% increase for additional space required by additions above.
Sub-B Executive Direction & Admin.	\$7,658	\$8,921	\$9,031	\$10,535	\$11,001	\$15,078	
<b>TM Patent &amp; Trademark Office Costs</b>	\$39,978	\$43,736	\$45,495	\$49,818	\$53,208	\$60,939	
<b>NET PROFIT/LOSS</b>	<b>(\$2,907)</b>	<b>(\$8,377)</b>	<b>\$1,215</b>	<b>\$1,451</b>	<b>\$17,139</b>	<b>\$9,461</b>	
<b>Trademark Applications</b>	120,395	125,237	139,745	155,378	188,848	200,000	

**Assumptions:**

- 1 - 1995 based on first three quarters annualized.
- 2 - 1996 trademark fees based on same number of applications as 1995 at the same rate.
- 3 - 1996 expenses are based on:
  - a) a 3% inflationary increase over 1995 costs
  - b) additional costs of creating a stand-alone Trademark Office. (see notes)

Mr. MOORHEAD. Well, thank you. I want to thank you all for the very interesting testimony that you have given, and I want to assure you that we are looking for ways, wherever we can, to improve our bill.

As you know, many of the things that some of you talked about have already been incorporated from our bill into the legislation that passed the House earlier by the Commerce Committee. So, you haven't been left out yet.

I would like to ask each one of you, would you support a bill which would require the PTO to implement the merit system, dispose of title 5, and also require that all quasi-judicial professionals be dismissed only for cause? If we did that, would you be supportive of the legislation? And I—Mr. Reardon, and Mr. Stern would also comment about what would be—

Mr. STERN. There is no question that that kind of a change is a change for the better, but I think that the full schedule of title 5 rights and responsibilities really are necessary. You know, you really can affect the career of a professional very much by just denying a raise, by threatening to take away some of the compensation. When you are dealing with folks who are \$60,000- and \$70,000-a-year folks, their concern is not only for their job, but their concern is also for their level of compensation and their view of their future career prospects.

Mr. MOORHEAD. I think that we are all worried about those things.

Mr. STERN. There are lots of ways of controlling people and exerting undue influence, and I think that the situation is a relatively complicated one in which a simple one-liner probably will not suffice. But, obviously, it is better to have those protections than not to have them.

Mr. REARDON. Mr. Moorhead, can I comment?

Mr. MOORHEAD. Yes.

Mr. REARDON. Our side has long advocated reforms in patent legislation that would promote the success of the system. And our view on this is that we recognize that there are potential pitfalls. We also have the optimistic outlook that improvement is worthy to be pursued. Our concern is that you, as you obviously are, are taking these into consideration and asking the employees. We've offered suggestions that might be done, although if they have other ways of approaching it, thank you for taking that into consideration.

Mr. TOBIAS. Mr. Chairman, I would just like to say one thing: that, as I understand what it is that you are trying to do, or one of the main things that you are trying to do with this legislation is to increase the efficiency of the Patent and Trademark Office.

Mr. MOORHEAD. That's one of the things.

Mr. TOBIAS. One of the major items—you wouldn't want to do it if it would decrease the efficiency, I assume that.

Mr. MOORHEAD. No.

Mr. TOBIAS. OK. Every single study that has ever been conducted over the last 10 years about which private sector corporations have had the most increase in efficiency in their workplace occur in the context of a labor union representing employees who have protections, and in that environment, the efficiency and effective-

ness of the private sector corporations has increased most dramatically. And those protections, those rights, those benefits, are not provided in the existing legislation. So, we think that, yes, indeed, it would be wise to provide the right to have a discharge subject to review, but that's only one small slice of the kind of job protections that are inherent in the existing relationship and would be existing if the corporation were truly part of the private sector.

Mr. MOORHEAD. Under 2517, there is an opportunity to bargain over almost everything.

Mr. TOBIAS. 2517 of which bills?

Mr. MOORHEAD. H.R. 2517.

Mr. TOBIAS. Under H.R. 2517—I don't have that one in front of me, but it is my understanding that it is not as broad as what is currently in the statute and what is currently available with the addition of Executive Order 12871. So, that even in the reconciliation language, the right to bargain is not as broad as that existing today.

Mr. MOORHEAD. Well, what you do get under the House-passed bill, equal opportunity in recruiting and hiring, equal pay for equal work, education and training, incentives for excellent performance, protection against arbitrary actions and favoritism, and protection for whistleblowing.

Mr. TOBIAS. As I say, I don't have the language in front of me, Mr. Chairman, but those kinds of protections are subject to the interpretation, I would assume, of the chief executive officer, and are those matters subject to bargaining? I mean, that's the issue.

Mr. MOORHEAD. Well, those would go along the lines of what I would really like. Because I am interested in the comments of each one of you, and I can't remember everything that each one of you say, I'd like you to give me one sheet, one page, in which you have two or three things that are most important to you to be included in our final package.

Mr. TOBIAS. I'd be happy to do that, Mr. Chairman. We'd be pleased to do that.

[See appendix.]

Mr. MOORHEAD. But we kind of see where people go together just a little bit.

Mr. TOBIAS. I'd be happy to do that.

Mr. MOORHEAD. I know that one of the big concerns that the two Congressmen had earlier was that if you didn't have just lots and lots of supervision you were all going to become kind of dishonest because you would be subject to all kinds of pressures and moving in any way that anyone wanted you to. I've never believed that the Patent Office—maybe I'm naive, but I've never believed that the issuance of patents were things that were subject to pressure somebody in. But you people moved in that direction because of pressure. Maybe I just happen to know the way they did it.

Mr. STERN. We have had inventors go on television railing against patent examiners who wouldn't give them a patent for a perpetual motion machine, and they do get publicity via Johnny Carson and folks like that. And, of course, they also come to the Patent Office and try to exert their influence in other ways that are perhaps not as open.

Mr. MOORHEAD. Well, have you ever had pressure put on you, any of you that have been in those offices, had pressure of that kind put on you? I mean realistic. Have you ever fallen for it? I hope not.

Mr. TOBIAS. We have a right to remain silent—

Mr. STERN. No, we don't need the right to remain silent. The truth is, we have been the beneficiary of a protected status, and our current status is a protected status. Examiners at the present time can only be removed for cause, and the cause has to be specified and shown.

Mr. MOORHEAD. I assure you that we don't want you to fall for any kind of pressure from anybody.

Mr. REARDON. Mr. Chairman.

Mr. STERN. By the way—oh, I'm sorry.

Mr. REARDON. The pressure takes many forms, if I could speak to patent examining for a moment. It is our jobs to handle that pressure, to carefully judge the record, and we have to face cogent arguments and see if they have a merit or not. That's one form of pressure. And, yes, sometimes people face other pressures, and we acknowledge that protections are useful in preventing us from succumbing to that.

Mr. MOORHEAD. Well, what we want to do is get rid of some of the bureaucracy and at the same time make sure that you are protected against any pressure of this kind, because it would be outrageous if you would make your decisions based upon the pressure that you got. That would be the last thing in the world that anyone would want, I would hope.

Mr. FRIEDMAN. Mr. Chairman, two comments, please.

Mr. MOORHEAD. Yes.

Mr. FRIEDMAN. First, on the matter that you have just spoken about, from the trademarks perspective, when you are deciding whether or not to approve an application for publication and registration for Nike or Coca-Cola, or conceivably in the future the Wizards, you know, you obviously have a lot—the people who apply for those applications, and hopefully they are looking for registrations, then they obviously have a lot riding on that small little "R" and so, therefore, similarly, like on the patents side, when you are a trademark examining attorney, there are obviously millions of dollars at stake when you are deciding whether or not to approve an application for publication and registration. So, I wanted to make that point.

Secondly, back on the matter that you had raised before and for which you had solicited a comment from everybody else, I would echo Mr. Tobias' comments. We would be glad to submit a brief statement focusing in on the two or three things I guess most important to us. I would want to say at this time that, while we take exception to a number of areas in the bill, we obviously welcome the opportunity to focus in on some of the things that are most critical to us.

In that regard, let me say, I think one of the overall concerns we have with the bill is that under any circumstance if we were losing title 5 rights by itself, or if we were not allowed to bargain collectively by itself, or if there was a CEO by themselves, all of those issues taken separately are very difficult. The difficulty is

compounded by the fact that under these bills all of them are coupled together, and so we're faced with a situation currently now where there's a CEO who now has unfettered discretion, we don't have the right to go through collective bargaining, and we're stripped of a number of our title 5 rights. So, I'm sure that will be to some degree a large focus of where NTEU 245 is coming from. And obviously, we're gratified that the chairman has asked for those comments and will welcome submitting them.

Mr. MOORHEAD. Just for my own curiosity, I would like to know approximately how many people each one of you represent. Mr. Stern, out of the 2,200 patent professionals, how many are dues paying members in your organization?

Mr. STERN. About 900.

Mr. MOORHEAD. And in the—Mr. Reardon, in the PTO society?

Mr. REARDON. Fourteen hundred.

Mr. MOORHEAD. Fourteen hundred.

Mr. FRIEDMAN. And on the trademark side. [Laughter.]

Ms. SIMMONS-GILL. As we said. [Laughter.]

Mr. MOORHEAD. Well, you said you were only a little, tiny group. [Laughter.]

Mr. FRIEDMAN. Well, let me tell you how tiny we are—

Mr. MOORHEAD. I thought five or six—

Mr. FRIEDMAN. On the trademark side, we have, as I said in my opening comments, 70 percent of our bargaining unit are members, and that translates roughly to about 130 people, 130 attorneys, both interlocutory attorneys as well as the trademark examining groups.

Mr. MOORHEAD. Mr. Tobias, how about yours?

Mr. TOBIAS. We have the rest. We have a 70-percent membership in our union. We represent the non-professionals, and we represent those in the trademark society. So, we have the—all of the folks other than the—

Mr. MOORHEAD. Well, everyone fits into one category or the other.

Mr. TOBIAS. Well, the three folks here are elected representatives of the employees of the Patent and Trademark Office. Mr. Stern represents the—those in the Patent Examiner Office; we represent the professionals in the Trademark Office and the nonprofessionals throughout the PTO.

Mr. MOORHEAD. On the trademark issue, that's a very important issue that we're concerned with in this subcommittee. As you know, we'd like to get—we've been looking into the Madrid Protocol and we've visited with the people in the European Union and Arpad Bosch, the World Trade Organization, and so forth, because we couldn't help but see the situation in South Africa where they turned out McDonald's because they might have some competition later on from their own people. It's very obvious that we have to get that kind of world protection.

At the same time I don't want to—you know we can make the bill better for you, and we might make it worse for somebody else. I don't want to get it to such a point that it can't go any place because everyone's got a little something to dig at in the bill that they would like a little better, a little different. I don't know whether there is anything that we can do to please the first two people



that testified, but I think there might be for you folks here. And we're going to try to make the bill as good as we possibly can.

I have a number of questions to ask each of you that would keep you here for a long period of time, but I want to first ask Ms. Wheeler if, since there's no one here representing the minority, is there any question that she would like to have asked?

Ms. WHEELER. I think that if we get the information that the chairman requested, that would be very helpful. Mrs. Schroeder is committed to making sure that in any reorganization, there is functional equivalence in terms of the employee rights, that exist today so that information would be very helpful. We would appreciate your giving very serious thought to that submission.

Mr. TOBIAS. Thank you.

Mr. MOORHEAD. There was some concern that was expressed earlier that, if we make this a Government Corporation, it was going to have the same pressures as if it were a stock-held corporation that had no desire to meet the needs of the people and the public in general or the patent applicants in general, and so forth. Do any of you have any comment on that testimony or how you view the situation? If it's going to do all the harm that some people seem to think it was, I would certainly not want it. We're trying to do away with the cash cow, to be honest with you. They're using the Patent Office to take off \$50 million or more a year that should be spent building up that Patent Office and using it for other programs. And it's not just the Democrats; the Republicans did it, too.

Mr. TOBIAS. Mr. Chairman, we represent the people in the Federal Deposit Insurance Corporation, which is the kind of Corporation which I assume that you're thinking about trying to create for the Patent and Trademark Office.

Mr. MOORHEAD. Yes.

Mr. TOBIAS. We represent the folks there. They do have title 5 protections. We do bargain collective bargaining agreements, and as a result of that—those folks who deal with billions and billions of dollars, who have liquidated over \$100 billion in the last 6 or 7 years as part of the bank failures that occurred in the 1980's—and we have created a process which I believe has immunized those employees from the kind of pressure and abuses that Mr. Rohrabacher was talking about earlier this morning.

Mr. MOORHEAD. Any other comment?

Ms. SIMMONS-GILL. The International Trademark Association definitely believes that the concept of a Government Corporation for the Patent and Trademark Offices is way overdue. That is, it is ideally set up to, since it is totally self-funded, to operate independently of large governmental institutions to the extent of its operations. Although we do understand that for its policies it should take appropriate guidance from the Government, which would happen in a Government Corporation. So, we are in full support of the notion of a Government Corporation. We are, as you know, extraordinarily concerned about the potential and continuing neglect of the trademark operation.

Mr. MOORHEAD. What I'm going to do is to present you with a group of written questions and ask you to give us your comments on them in writing. I hope we can get them by the end of next week. And they are directed specifically at the specific members,

even though I will give you a package that goes to everyone. If you have comments about any of the other questions than those that are specifically asked of you, give your comments there also.

The ranking member, Mrs. Schroeder, apologizes for her absence. She was required to be at the Pentagon. Without objection, her written statement will be made a part of the record in an appropriate place. And I can assure you that she is just as interested in these issues as I am, and we will be working very closely together to protect your rights and those of the patent applicants and those of the public as we go forward with this legislation.

Thank you all very much for coming, and I'm sure that our staff will get those questions. They're available over here. So that you can have them right now.

Mr. TOBIAS. Thank you.

Mr. MOORHEAD. Those responses will be made a part of the record.

[See appendix.]

Mr. TOBIAS. Would you——

Mr. MOORHEAD. We will close the record on Friday of next week. So if you have things that you would like to tell us, believe me, these will be looked at.

Mr. TOBIAS. Would you like us to submit our suggestions, the one-page suggestions to——

Mr. MOORHEAD. Put your questions along with them.

Mr. TOBIAS. They should be part of these responses?

Mr. MOORHEAD. They should be.

Mr. TOBIAS. OK, fine. Thank you.

Mr. MOORHEAD. Thank you. The subcommittee is adjourned.

[Whereupon, at 11:43 a.m., the subcommittee adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARINGS

Mr. Thomas Mooney, Counsel- Subcommittee Courts and Intellectual Prop.  
The House Office Building  
Washington DC

HR 1659

Regarding: September 14, 1995 Hearings to Make the Patent Office  
an Independent Agency of Government

### Action

Requested: To enter these comments into the formal record to be  
considered by the Committee

914-649-3817

The Patent Office is currently within the overall superstructure of the Commerce Department and the Commerce Secretary. Over the years, the Commerce Department mission has expanded from general census-taking to adding on various functions including the Patent Office. Historically, the Patent Office was not a part of the Commerce Department until the 1920s.

Currently, there are dozens of independent agencies ranging from the National Science Foundation to the National Transportation Safety Board, FEMA, the Pension Benefit Guarantee Corporation, the Architect of the Capitol and the Smithsonian Institution.

The advantages of making the Patent Office an independent agency are considerable. Organizationally, the Office would function independent of the other branches of government instead of being under the direct command of the Executive Branch. The independent agency organizational design would enhance the "Independence of mind" which is so important with regard to the maintenance of intellectual property- patents. The Office should have a minimum number of outside influences which could influence the independent nature of the judgments it is charged with rendering. In recent years, the Patent Office has assumed more power and authority over traditional State functions. For instance, in the evaluation of Patent Agents and Patent Attorneys, the Office determines qualifications and mandates educational content which is the sole purview of the States.

The Committee is asked to review very carefully the construct of the Patent Office organizational design and mission as against the existing powers of the States under the 10th Amendment, Department of Education Organization Act, 20 USC 3403(a). The various States and not the Patent Office determine educational standards and educational content. The dividing line is murky between the States' jurisdiction in interstate commerce (particularly Regional Commerce) versus the primacy of the federal government to regulate interstate commerce. Constitutionally, the Courts have swayed in both directions on this issue. The legislature should set the dividing line very clearly by giving the States and the various regions the power to determine local commerce and to have exclusive jurisdiction in defining and reviewing educational content.

Sincerely,

Joseph S. Marasca  
Box 646  
Bloxville, NY 10708

# **NAM** National Association of Manufacturers

*Howard Lewis III*

*Vice President*

*Trade and Technology Policy*

September 13, 1995

The Honorable Carlos J. Moorhead  
Chairman, Subcommittee on Courts and Intellectual Property  
Committee on the Judiciary  
U.S. House of Representatives  
B-315 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairman:

As the Courts and Intellectual Property Subcommittee considers the future of the Patent and Trademark Office (PTO), I want to communicate to you and other Subcommittee members the position of the National Association of Manufacturers.

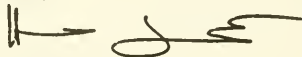
The NAM favors the establishment of the PTO as an independent government corporation, generally along the lines proposed in your bill H.R. 1659. An NAM statement to this effect is attached. We believe this approach would result in a PTO that is more flexible and responsive to users' needs. Further, the NAM's support for a PTO corporation is long-standing and independent of current efforts to dismantle the Commerce Department.

Our support for a PTO corporation is in large part based on our goal to end the diversion of PTO user fees to the general revenue fund. The collection of PTO user fees beyond that necessary to support the PTO's own operations is essentially a tax on innovation. As such, it constitutes singularly poor public policy and should be ended as quickly as possible. Sections 113 and 202 of H.R. 1659 would end this pernicious practice, and we enthusiastically support these provisions.

Given the continuing tension between intellectual property and antitrust law, we believe it unwise to house the PTO in the Justice Department as proposed in H.R. 1756. Similarly, the NAM cannot support the Senate's recent proposal in its bill S. 929 to roll the PTO into a hodgepodge "patent, trademarks and standards" entity.

The NAM appreciates your leadership on this issue and looks forward to working with you. We respectfully request that this letter and the attached statement be made part of the September 14, 1995, hearing record.

Sincerely,



*Manufacturing Makes America Strong*

1331 Pennsylvania Avenue, NW, Suite 1500 - North Tower, Washington, DC 20004 • 1790 • (202) 637-3144 • Fax: (202) 637-3182



## Establishing the PTO as a Government Corporation

The National Association of Manufacturers supports the concept of establishing the U.S. Patent and Trademark Office (PTO) as an independent agency having the authority of a government corporation. Such an agency should include the following features, among others:

- authority for the PTO to borrow money by issuing bonds;
- increased flexibility, similar to that of a private corporation, on matters such as personnel policy, salaries and contracting for services;
- appointment of a chief executive officer for a fixed term of years;
- establishment of a board of directors or advisory board whose members would be users of the PTO from the private sector; and
- close Congressional oversight of PTO user fees and operations.
- all PTO user fees collected are retained by the PTO for its own uses.

— *Adopted by the NAM Intellectual Property Task Force on September 9, 1992* —

— *Revised and reaffirmed by the NAM Intellectual Property Subcommittee on June 12, 1995* —



AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION  
2001 JEFFERSON DAVIS HIGHWAY, SUITE 203, ARLINGTON VIRGINIA 22202-3694

FOR IMMEDIATE RELEASE

CONTACT: Diane Chapin  
(703) 415-0376  
(301) 983-1698

BAR ASSOCIATION ENDORSES PRIVATIZATION OF PATENT OFFICE

Privatizing the U.S. Patent and Trademark Office (PTO) will create a more efficient patent and trademark system, provide inventors with better services, and hold down fees, a leading bar association testified today.

Speaking on behalf of the American Intellectual Property Law Association (AIPLA), Executive Director Michael Kirk testified today before the House Court and Intellectual Property Subcommittee. AIPLA's 9,400-members practice patent, copyright, trademark and other forms of intellectual property law.

The House subcommittee is considering H.R. 1659, a bill that would turn the PTO into a wholly-owned government corporation overseen by an 18-member advisory board that would report annually to the President and specified congressional committees.

2 - KIRK

The legislation was introduced last May by Subcommittee Chairman Carlos Moorhead (R-CA).

The administration also has been working on a bill to transform the PTO into a government corporation, but has not yet officially released a draft.

In his testimony, Kirk pointed out the PTO is a perfect candidate for privatization, meeting the requirements set forth by President Harry Truman. Truman said a government corporation must:

- have programs predominantly of a business nature;
- be revenue-producing and potentially self-sustaining;
- have programs that involve large numbers of business transactions with the public.

Kirk enumerated the many advantages of making the PTO a private corporation:

The PTO would no longer have to ask congressional permission to spend monies it collects under the PTO surcharge fund. This is money paid by inventors but put into a separate surcharge fund controlled by the congressional appropriations process. Each year since 1992, millions of dollars of surcharge funds have been diverted to fund non-PTO functions, depriving inventors of services they paid for.

3 - KIRK

It would exempt the PTO from artificial reductions that make no sense in a revenue-producing agency. For example, headcount restrictions force use of contract labor which saves no taxpayer revenues and drives up prices users must pay.

It would allow the PTO to contract for people, space and printing and develop new information technology at competitive rates without government red tape.

It would insulate the operation from micromanagement by government bureaucrats and free the corporation from unnecessary regulatory interference.

These many advantages would allow the Patent and Trademark Office to operate at peak efficiency and by restraining costs, would help the creative community, especially independent inventors who are so important to American competitiveness, Kirk said.

While strongly endorsing H.R. 1659, AIPLA's testimony also pointed out some changes needed in the bill, including greater flexibility in the setting of fees and greater freedom to offer a competitive salary to the managers of the PTO.

Kirk went on to say that AIPLA could not support the administration's draft proposal to create "The United States Property Organization Act of 1995."



4 - KIRK

Kirk said that while AIPLA does not object to the administration plan to continue the PTO in the Department of Commerce or to create the position of an Under Secretary of Commerce for Intellectual Property, the top manager of the PTO should not be subject to the policy direction of the Under Secretary.

This continuation of government oversight and division of tasks would seriously disrupt the PTO's operations, he testified. In addition, without an advisory body of patent and trademark system users to oversee the operation of the office, AIPLA finds the administration plan unacceptable.

Kirk also commented on H.R. 1756, "The Department of Commerce Dismantling Act," which would transfer jurisdiction over the PTO to the Department of Justice (DOJ).

Kirk said that, "If the PTO is to continue to report to a cabinet level official, it should not be in a department where the needs of the PTO would be diluted by competing interests within that department." He noted that another proposal calls for the PTO to be transferred to the Treasury Department and encouraged legislators to look for equally appropriate places for the PTO to reside.

# Patent and Trademark Office Society

P.O. BOX 2089 • ARLINGTON, VIRGINIA 22202

Mr. Moorhead:

Since your introduction of HR 1659 on May 17, 1995, the Patent and Trademark Office Society (PTOS) has enjoyed working with you and your staff on legislation affecting the patent and trademark systems. Thank you for welcoming our testimony before your subcommittee on the proposed corporatization of the PTO.

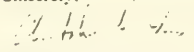
As shown by the overflow crowd on February 29, 1996, the PTOS membership was excited to hear you speak about your career, intellectual property and corporatization. We are truly grateful for this effort on our behalf and we missed your company at the luncheon following your speech.


This effort, your history of fighting for the PTO, and the open way you have conducted the legislative process have proven your concern for the PTO employee and the intellectual property system. The PTOS appreciates your sincere interest in the Patent and Trademark Office and its employees.

Attached are our answers to the questions posed after our testimony of March 8, 1996 on HR 1659 and HR 2533. We have answered your three questions as fully as possible and hope that you find this information helpful in understanding the PTOS perspective on H.R. 1659 and in guiding the challenging deliberations ahead.

We look forward to working with you and your staff on other intellectual property legislation during the remaining session.

Sincerely,

  
Elizabeth Dougherty  
President

  
Timothy Reardon  
Congressional Liaison

Dedicated to the improvement and appreciation  
of the United States Patent & Trademark Systems

To: The House Judiciary Committee's Subcommittee on Courts and Intellectual Property

Date: March 15, 1996

Re: Answers to the Questions for Panel 1 of March 8, 1996 concerning HR 1659  
and HR 2533

The PTOS provides the following answers to the three post-testimony questions.

14. There are currently 1832 dues paying members in the Society, composed of 1402 active members and 430 associate members. Active members are those dues paying members who are currently employed at the PTO. Associate members are those dues paying members who do not currently work at the PTO and include patent and trademark practitioners, federal judges, and all other professionals engaged in work related to procuring patents or trademarks for others.

15. Insofar as we have not analyzed all of the ramifications of H.R. 1659, have not taken a position on several of its sections, and have previously stated certain concerns with the Bill in its present form, we do not support the current version of the Bill. However, we are encouraged that H.R. 1659 successfully addresses much needed reform. For instance, the Bill ensures that the PTO has adequate funding, staffing and resources.

While we do not endorse H.R. 1659 in its current form, the following three changes would significantly improve the Bill.

- Removal of employees only for cause must be included in the Bill to protect impartial quasi-judicial decision making in the granting of patents and trademarks.
- The Bill should use the GS pay scale as a base level of salary compensation, while allowing the corporation to supplement this base compensation. Using the GS pay scale as a base level would satisfy employees that their salaries

would not decrease and would give the corporation the option to offer higher wages to attract and retain competent employees.

- The Advisory Board must be given authority to directly check and balance the actions and decisions of the Commissioner. For example, we suggest providing the Board with a 2/3 vote override capability to curb fundamentally inappropriate actions.

16. The PTOS can speak only for its membership, not the general PTO employee. Our analysis of H.R. 1659 did not address the likes or dislikes of PTOS members toward the provisions of Title 5 as a whole, so we can not directly answer your question. However, we have addressed the Title 5 exclusions above in our answer to Question #15 and more fully in our written statement presented to the Subcommittee on March 8, 1996.

# Patent Office Professional Association

Post Office Box 2745, Arlington, Virginia 22202

March 15, 1996

The Honorable Carlos J. Moorhead, Chairman  
Subcommittee on Courts and Intellectual Property  
Committee on the Judiciary  
2138 Rayburn House Office Bldg.  
Washington, D.C. 20515

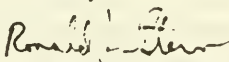
Dear Mr. Moorhead:

Thank you for giving us the opportunity to present our interests and concerns regarding the proposed reorganization of the Patent and Trademark Office. In accordance with your request, we have attached our answers to the questions posed at last Friday's meeting.

In addition, you asked that we specify the most important provisions we believe need to be included in any bill to make the PTO a government corporation. The direction our membership wishes to take is relatively simple. Let the PTO corporation have relief from FTE ceilings, let them keep the fee money, let them have freedom in buying or leasing buildings, but don't disturb our civil service rights. We believe the best course of action is to maintain the status quo by being silent on personnel matters. That means deleting Sections 103 (e) and (g) in H.R. 1659 and the equivalent in the other bills.

Secondly, we believe that employees have a significant concern about the quality of our examination system. Consequently, any section that focuses on setting performance standards based on productivity, cycle times, efficiency, and customer satisfaction must be balanced by an equivalent expressed concern for quality and the public interest. We believe that you can utilize the pride and professionalism of our patent professionals to safeguard quality and the public interest by providing for the negotiability of performance evaluation systems and performance standards.

Sincerely,



Ronald J. Stern, President  
Patent Office Professional Association  
Tel. (703) 308-0818

## Response to Questions Asked of Ron Stern by the House Subcommittee on Courts and Intellectual Property

1. Out of the 2200 patent professionals at the PTO, how many are dues paying members of your union?

**Answer: about 900 patent professionals**

**Further explanation:**

It is widely known that POPA, as a federal employee labor union with exclusive recognition, has a statutory duty to represent all members of the bargaining unit equally, regardless of whether or not they pay dues. We have scrupulously followed the law in this regard, and even distribute our newsletter to all, regardless of dues paying status. Under circumstances in which virtually all services are provided without a requirement for payment, it is not clear to some employees why they should pay dues.

Our organization is primarily intended to provide representational services to non-managerial patent professionals. It does not provide the social, entertainment, or educational services that constitute the reasons for joining the Patent and Trademark Office Society.

In preparation for these hearings, we conducted two large group forums in September, 1995, inviting all employees, regardless of dues paying status, to attend. We also conducted a survey of all interested bargaining unit members so that we could accurately convey the opinions and concerns of a broad spectrum of patent professionals.

The results of that survey were communicated to the Subcommittee in October and again on February 29, 1996. We hope you will study the results of that survey, since it contains the answers to many of the other questions you have asked.

2. In your testimony you argue that removing the PTO from Title 5 would make employees vulnerable to undue political pressure because an unsuccessful patent applicant may exert pressure by complaining to their supervisors. Don't you think that the user community, the advisory board and the Congress are a check on the political appointment process like we are with other government corporations? Is it your belief that the Congress and especially this Committee would sit by and let there be appointed a do-nothing rubber stamp advisory committee?

Answer to First Question: **No**

Answer to Second Question: **Yes**

Further explanation:

In our September 1995 survey (question 10), 64% of the patent professionals said that their quasi-judicial decisions may be compromised if the PTO corporation eliminates civil service protections.

The user community, the advisory board, and Congress are all groups designed to exert political influence; their role is not to insulate the PTO from political pressure. To suggest that Congress will insulate examiners from political pressure, is to believe that the fox should guard the hen house.

Not all political influence is bad. We recognize that the political process is the primary instrument by which we ensure that the needs of stakeholders are met. It is not a substitute for the case-by-case policing, auditing and appeal functions that our society uses to maintain the integrity of its institutions.

The testimony of Representative Rohrabacher and Representative Hunter show that even Members of Congress believe that *statutory* protections for patent professionals at least equivalent to those provided by Title 5 are needed to protect the integrity of the patent system.

3. A report issued by the General Accounting Office in December, 1995, states that of the 22 existing government corporations, 10 are not statutorily subject to Title 5. In your opinion, are all of the employees of almost half of the existing corporations unprotected and in fear of their jobs? Don't you think we might have heard something by now?

Answer to First Question: **No**

Answer to Second Question: **No**

**Further explanation:**

In our September 1995 survey (question 12), 80% of the patent professionals said that if their civil service rights are taken away, they will not feel free to voice their concerns about PTO policy or how the PTO operates.

We will be in fear of losing our jobs under the conditions of the proposed legislation. Obviously, people who fear for their jobs do not run around and make it known.

The issue is not whether *all* employees who are "at will" employees are in fear of their jobs, but whether *any* are in fear. Certainly, the subcommittee does not want to condone the concept that it is OK to intimidate employees so long as only a few are corrupted.

The implication in your question that employees in half of all government corporations are unprotected because they are exempt from the key economic provisions of Title 5 is misleading. First, the three largest organizations provide significant employee protections through the mechanism of full scale economic bargaining. This includes: the TVA, Amtrak and the FDIC. These organizations also provide significant employee protections through grievance procedures and contractually established limitations on removal of employees.

Some of the corporations don't even have employees and thus don't need employee protections. In particular, the Federal Financing Corporation and the Resolution Funding Corporation, have no paid employees at all; their functions are performed by employees of other agencies.



Furthermore, other corporations are so small that one would expect the culture to be radically different than in a 5000+ person organization. One such corporation, the NCUA Central Liquidity Facility, has only 1.5 full time equivalent positions. The African Development Foundation with 54 positions, and the Rural Telephone Bank with only 10 borrowed employees are just not comparable organizations. The U. S. Enrichment Corporation has a budget in the billions but a staff of only 77.4 full time equivalent employees. It is my understanding that virtually all functions have been contracted out.

There is no government corporation in the list of exempt corporations in which the employees are administering a sovereign power.

4. As you know, the First Amendment always gives you the right to petition Congress. You and your union have been very outspoken on the legislation before us, and I urge you to continue communicating with us. Wouldn't you continue to advise Congress on any perceived abuses or policy guideline breaches by a new PTO to aid us in our necessary oversight duties over the PTO? Doesn't this help to provide a check along with input from users and the advisory board?

**Answer to First Question: No**

**Answer to Second Question: No**

**Further explanation:**

In our September 1995 survey (question 12), **80%** of the patent professionals said that if their civil service rights are taken away, they will not feel free to voice their concerns about PTO policy or how the PTO operates.

The first amendment may give us the right to speak to Congress but, Title 5 gives us the right to keep our jobs without pay penalties while exercising our first amendment rights. Key provisions are those dealing with layoffs and those pertaining to classification and pay.

Statutory guarantees against retaliation for whistle blowing are not sufficient to protect employees. Most retaliation takes the form of an

attack on the competence of an individual which is said to be independent of the disclosures made by the employee. To protect employees from such retaliation, an employee must be able to defend himself by a mere showing that he performs his job capably and not be required to meet the higher standard of proving the motivation of his bosses. Without a statutory guarantee against arbitrary layoffs, unwarranted decreases in pay, or mere failures to fairly promote, enforceable by an individual in a judicial or administrative procedure, an employee would put his economic future at risk by communicating anything that would embarrass his supervisors.

Congress is not organized and does not have the resources to address individual situations on a routine basis. If the subcommittee wants to tackle such activities we have about 50 cases we can start with. Unless there is a dramatic pattern of abuse, Congress is not expected to devote resources to investigate and correct individual situations.

We are disappointed in the past responses of the subcommittee to potential abuses that we have brought to your attention. In the mid 1980's we alerted the committee to the excessive costs inherent in the program to computerize our patent database. Many hundreds of millions of dollars could have been saved by simply delaying the project and relying on the paper files for a few more years. As it turns out, the PTO still relies on the paper search files for most of its work (and thus has had to expend the resources to maintain them anyway) and the computer system is still not sufficiently effective to allow elimination of the paper files.

Last year Congressman Rohrabacher alerted Congress to the fact that the PTO intended to significantly cut back on the amount of reclassification work that was to be done. Failure to maintain an adequate reclassification effort can jeopardize our ability to do a complete search in a reasonable amount of time. We know of no action taken by the subcommittee in its oversight role.

Currently, you have been made aware of the PTO's failure to classify and place new foreign patents in the examiners' search files. Failure to provide examiners with ready access to the foreign patents constitutes a violation of our treaty obligations under the Patent

Cooperation Treaty concerning the minimum documentation that will be searched. We believe that this is the kind of problem for which your subcommittee could craft a solution. We will be interested in hearing your evaluation of this problem and seeing what type of solution you can craft.

5. One of the biggest complaints of Title 5 protections is that they comprise an inefficient, one size fits all system which cannot be molded to fit different types of agencies. Under the merit systems principles in Section 2301(b) of Title 5, which would have to be incorporated in guidelines adopted by the new PTO under the House-passed H.R. 2517, employees would be afforded the following protections:

- (1) equal opportunity in recruitment and hiring
- (2) equal pay for equal work
- (3) education and training
- (4) incentives for excellent performance
- (5) protection against arbitrary action
- (6) protection for whistle-blowing

The Equal Employment Opportunity Act would also apply. So the current Title 5 protections would not be placed exclusively in the hands of the Commissioner, as you state in your testimony, but rather the principles incorporated in Title 5 would by law be required to apply to the PTO. The only difference with the PTO implementing these principles instead of subjecting the Office to Title 5 procedures is that we remove the bureaucracy of OPM and the Department of Commerce from the process. This helps management and employees because every organization is not the same and specific guidelines can be adopted which are molded to fit the PTO's special functions. Why isn't this a good idea?

**Answer: Patent Professionals need to have enforceable statutory protection**

**Further explanation:**

In our September 1995 survey (question 13), 88% of the patent professionals said that the position of Patent Office Professional Association should be that PTO employees maintain *statutory* rights equivalent to Title 5. Only 5% (question 14), said that the Patent Office Professional Association should support H.R. 1659.

This is another proposal to have the fox guard the hen house. If the head of the organization gets to determine if his own actions conform to the merit system principles, no meaningful protection is provided. However, if Congress were to direct that enforcement was to be by neutral third parties, such as judges or arbitrators, on a case by case basis, the protections would be quite meaningful.

The question also assumes that the bureaucracy at OPM and the Department of Commerce impede the operations of the PTO. On balance, it has been our experience that these organizations are more helpful than not. Most actions taken with respect to, or advice given to, the PTO are appropriately tailored to the PTO's needs when those needs are properly explained.

Representative Hunter, Representative Rohrabacher and Representative Chrysler agree with patent professionals that specific guidelines for protecting patent professionals need to be by *statute*. H.R. 2517's subjective requirement of "consistent with" the merit principles in section 2301(b) of Title 5 is by no means an enforceable statutory guarantee. If bureaucracy is a problem, then fix the bureaucracy via traditional congressional oversight. Do not threaten the integrity of our country's intellectual property system for purposes of experimentation or because of failure to exercise proper congressional oversight.

6. There is a widespread belief throughout this Congress and this Administration that the current civil service system no longer adequately responds to the needs of federal employees or management. Your testimony states that you cannot imagine a better system than the current one. Who else holds this view?

**Answer: Senate Committee on Governmental Affairs, Representative Rohrabacher, Representative Hunter, Representative Chrysler, small inventors, small businessmen, universities and more members of Congress, in both houses and on both sides of the aisle, think this system is better than what is proposed in the PTO corporation bills.**

**Further explanation:**

In our September 1995 survey (question 13), 88% of the patent professionals said that the Patent Office Professional Association should oppose any bill which does not maintain civil service rights at least equivalent to those under the present Title 5 *statute*.

As you recognized in the prior question, the complaint about the current civil service system is that government wide rules do not necessarily meet the diverse needs of the many different federal activities. But the inadequacies of the civil service system with respect to organizations other than the PTO is really irrelevant.

What we must look at is whether the civil service system has defects with respect to our operation at the PTO. Although there is much talk about the need for flexibility, no specific inadequacies have been identified at the PTO, except as to the need to be free from FTE limitations and the need to retain within the PTO the fees paid by our customers for our services.

The only witness who has provided specifics as to problems faced by the PTO is Harold Seidman of The National Academy of Public Administration. Each of his specific allegations of deficiency has been analyzed in my written testimony. Our conclusion is that the employees' civil service protections have not impeded management's ability to

manage. Nor have those protections provided tolerance for poor performance. Nor have those protections curtailed management's ability to hire and fire employees, or pressure employees to do more work.

The "one size fits all" complaint does not apply to patent professionals because the PTO has already customized the system to meet its own needs. The PTO already has appropriate "direct hire" authority for examiners. The job classification scheme for patent attorneys, patent examiners and patent classifiers, covering the GS-1220 to GS-1226 series, was custom designed for the PTO. More than five special salary scales have been constructed for the PTO. Special performance appraisal plans have been established that measure time to tenths of hours (i.e., increments of six minutes). There is no need for additional flexibility.

The principal impact of the proposed legislation on personnel management is not to provide needed flexibility, but rather to eliminate oversight.

It is not true that I testified that I could not imagine a better system than the current one. We definitely believe that there are worthwhile improvements that should be made. For example, performance appraisal systems and performance standards should be made negotiable items. It would also be wise to incorporate the provisions of E.O. 12871 on labor management partnerships into statute.

Effective protections need to be established by *statute*. H.R. 1659, H.R. 2517 and H.R. 2533 do not provide a better *statutory* system than the present Title 5. Representative Hunter, Representative Rohrabacher and Representative Chrysler agree that patent professionals perform a unique core governmental function, the performance of which is not adequately protected by *statute* in any of the PTO corporation bills.

7. Why do you favor a pay scale that is capped well below what would be authorized under H.R. 1659?

**Answer: We favor published pay scales based upon comparability with the private sector coupled with fair and objective placement on those scales**

**Further explanation:**

H.R. 1659 provides a slightly lower pay cap than current law because it limits base pay to Executive level III. Current law merely limits total compensation to Executive level I, as does H.R. 1659.

At present, the highest paid members of the bargaining unit (and there are only two) are on what is called a "senior level" pay scale. By OPM regulation, senior level pay may extend all the way up to the rate of basic pay for level IV of the Executive Schedule.

Of course, pay is more important than pay caps. Under the proposed legislation, the possibility of higher pay is offset by the possibility of lower pay. Control over pay is placed in the hands of the CEO with no substantive checks and balances.

But even pay itself is not the most important factor. In our September 1995 survey (question 4), 82% of the patent professionals said that they are not willing to risk their civil service protections for the possibility of higher pay.

H.R. 1659 does *not* provide protection against abuse or mistake. H.R. 1659 does *not* provide pay scales which are fairly and objectively tied to performance. H.R. 1659 allows for lower pay as well as cronyism. Patent professionals have repeatedly asked that the present pay system at least be treated as a floor, if the true intention is to pay us more.

8. On page 14 of your testimony, you list 8 aspects of the current civil service system which provides so-called flexibility to pay people more. But they apply in very specialized circumstances and most require OMB, OPM and/or pay agent approval. Further, the rewards for successful performance are capped at a low 10-20% of salary. Is this true flexibility? Don't the employees of the PTO deserve better?

Answer to First Question: **Yes**

Answer to Second Question: **Yes, PTO employees do deserve better from management**

Further explanation:

In our September 1995 survey (question 3), **79%** of the patent professionals said that they believe they will receive the same or less pay in a PTO corporation than presently.

Also, in our September 1995 survey (question 11), **69%** of the patent professionals said that they feel production requirements for awards will increase.

The current system provides PTO management the option to pay PTO employees more for a large range of circumstances. This is true flexibility. There is nothing in the proposed legislation that would induce management to be more likely to pay professionals more than is currently paid.

The PTO presently requires 130% work effort for the possibility of getting a 9% award. The subcommittee has characterized rewards for successful performance in the range of 10-20% as low. We would welcome the subcommittee's help to induce the PTO to use its existing authority to pay higher rewards for successful performance.

We are unaware that the need to get OMB or OPM approval should be characterized as a problem. We know of no instance in which a PTO request for permission to pay higher salaries has been turned down.

Employees deserve statutory assurance, enforceable in a court of law, of equal pay for equal work. Employees deserve statutory assurance, enforceable in a court of law, of pay comparable to that paid in the



private sector for comparable work. Employees deserve statutory assurance, enforceable in a court of law, of placement in a pay scale on the basis of fair and objective criteria.

Our customers, including applicants, competitors, and the public, deserve a pay system that will maintain a workforce that is technically and legally competent to exercise the sovereign power of granting Constitutionally established rights to intellectual property.



International Trademark Association

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March 15, 1996

Honorable Carlos J. Moorhead  
Chairman  
Subcommittee on Courts  
and Intellectual Property  
Committee on the Judiciary  
U.S. House of Representatives  
Room B-351A  
House Rayburn Office Building  
Washington, D.C. 20515

VIA HAND DELIVERY

Dear Mr. Chairman:

On behalf of the International Trademark Association (INTA), I have set forth below responses to the written questions submitted at the conclusion of the March 8, 1996, hearing on H.R. 1659 and H.R. 2533.

Question 1. What's wrong with a combined Patent and Trademark Office? Do you feel that trademark applicants have been ill-served under the present combined structure?

Response to Question 1. As detailed in our prepared statement, a combined Patent and Trademark Office (PTO) does not take into account the unique needs and particular interests of the PTO's Trademark Operations and of the trademark community in general. For example, while the technology has long been in place to permit the electronic filing of trademark applications, this initiative has been stalled due to problems with related patent automation projects. Moreover, procurements for technology purchases are tied to the needs of the Patent Operations; the special automation requirements of the Trademark Operations are secondary to those needs. In the area of rule changes, trademark management frequently is stymied in implementing new rules due to the PTO's desire for uniformity and concern for the impact of any changes on the Patent Operations.

The adoption of PTO-wide policies with regard to labor/management relations and personnel issues also has disadvantaged the Trademark Operations. Due to differences in the work performed and in the size and demographics of the two examining corps, personnel policies that are appropriate for the Patent Operations often do not make sense vis-a-vis the Trademark Operations. An agreement or resolution acceptable to trademark management and the unions that represent trademark employees may be nixed if the impact on the Patent Operations is negative. Thus, trademark management often is unable to establish and implement the policies and practices it believes are best for its employees. INTA is also aware that trademark fees have been used to fund studies by other parts of the PTO -- studies that senior Trademark management has not been aware of and does not support.

Hon. Carlos J. Moorhead

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Further, as a result of the demands of the job and the organizational structure of the PTO, the PTO Commissioner is unable to devote sufficient time to the needs and concerns of the Trademark Operations. These responsibilities are delegated to the Assistant Commissioner for Trademarks. However, as a result of the PTO's organizational structure, the Assistant Commissioner lacks the ability to set policy on the wide range of issues (e.g., personnel, labor-management, automation, legislation) that impact directly on the Trademark Operations.

There is no doubt that trademark applicants and owners have been ill-served by the combined structure. The current state of the Trademark Operations is deplorable. Trademark applications and other documents take too long to examine and process and are frequently lost or misplaced. This is unacceptable. Trademark management lacks the ability to run the Operations as it deems best. Short of a major catastrophe, the concerns of the trademark community rarely get to the Commissioner's desk, and then are considered only as they relate to the Patent Operations.

The copyright community can turn to the Register of Copyrights to address its problems and concerns, and the patent community can turn to the Commissioner. Who can the trademark community turn to? The truthful answer is no one.

Question 2. Under your suggestion that a separate government corporation exist for Trademarks, would both the patent and trademark corporations have their own administrative support staff to handle functions such as accounting, human resources, data processing, and so forth? If so, how much do you think this would add to the cost of operating compared to current shared administrative support?

Response to Question 2. Under INTA's proposal, the separate patent and trademark corporations each would have its own administrative support staff. Worst-case scenarios prepared by the PTO's Budget Office have placed the additional cost at approximately \$9 million. Several points, however, need to be made.

First, some of the additional costs would be one-time expenditures, such as the purchase of a dedicated mainframe computer. Second, although there would be some additional costs, there also would be offsetting cost reductions and efficiencies. For example, as discussed above, creation of a separate Trademark Operations would put an end to the practice of spending trademark fees on projects of little or no interest or consequence to trademark management.

As noted in our prepared remarks, based on an economic analysis commissioned by INTA, a separate Trademark Office would generate a net surplus of \$9.5 million, even assuming additional administrative costs. Thus, a separate and independent Trademark Office would not require fee increases. Moreover, a separate Trademark Office would result in a much more efficient and cost-effective trademark operation, thereby providing significant benefits to trademark owners particularly and to commerce generally.

International Trademark Association

Hon. Carlos J. Moorhead

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Question 3. What are the current safeguards protecting the trademark part of the PTO from being overshadowed by the patent part? Are there currently separate operating budgets with separate review processes and procedures?

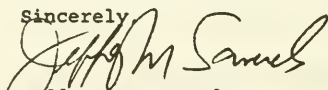
Response to Question 3. There are no safeguards protecting the trademark part of the PTO from being overshadowed by the patent part. That's the point. The PTO's Patent Operations is ten times the size of the Trademark Operations. That being the case, the current combined PTO guarantees that the Trademark Operations will always be overshadowed by the Patent Operations. This operational inevitability results in a less efficient and cost-effective Trademark Operations, to the disadvantage of U.S. trademark owners and the public at large.

There currently are separate operating budgets with separate review processes and procedures within the PTO. But that is not the issue. The point is not that the Trademark Operations lacks the funds to perform its responsibilities in a timely and effective manner, but, rather, that trademark management is unable to control and direct the use of trademark fees in the most suitable ways and cannot effectively prioritize expenditures. The creation of a separate Trademark Office, however, would enable trademark management to allocate available funds in the best way possible, and to be directly accountable for doing so.

INTA trusts you will find these responses helpful as the Subcommittee proceeds to mark-up the above-noted bills.

Please contact the undersigned at (202) 414-4076 should you or members of your staff wish to discuss this matter further.

Sincerely



Jeffrey M. Samuels  
Government Relations Manager

JMS:ndmb

cc: Mitch Glazier, Assistant Counsel

UNITED STATES GROUP

*International Intellectual**Property Association*

AIPPI

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March 14, 1996

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The Honorable Carlos J. Moorhead  
 Committee on the Judiciary  
 Subcommittee on Courts and Intellectual Property  
 United States House of Representatives  
 c/o Tom Mooney  
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Re: HR 1659  
 The Patent and Trademark Office Corporation Act of 1995

**Secretary**

**DANIEL D. FETTERLEY**  
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Dear Mr. Chairman:

I appreciate the opportunity to submit this letter on behalf of The International Intellectual Property Association ("IIPA"), the United States Group of AIPPI (Association Internationale pour la Protection de la Propriete Industrielle) to present the position of IIPA on HR 1659, the Patent and Trademark Office Corporation Act of 1995.

**Executive Committee**

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IIPA is a United States Group that is deeply involved in, and closely follows, diplomatic activities in the intellectual property field, including Patent Harmonization, the Madrid Protocol, GATT and NAFTA. IIPA works within the framework of its international parent organization to advance the interests of U.S. nationals in the international intellectual property field. The organization is also dedicated to taking an active role in the formulation of U.S. laws and policies relating to all aspects of intellectual property.

IIPA joins with the American Intellectual Property Law Association, the American Bar Association Intellectual Property Section and the vast majority of the lawyers in private and corporate practice, in government services, and in the academic community, to embrace the transformation of the Patent and Trademark Office into a government corporation, with sufficient independence to insulate it from micro-management of any

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UNITED STATES GROUP

*International Intellectual Property Association*

AIPPI

the Honorable Carlos J. Moorehead  
Committee on the Judiciary  
March 14, 1996  
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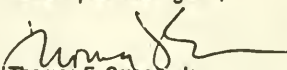
Cabinet level department in which it were to reside, currently the Department of Commerce. We share the view that the PTO could function more effectively and provide its users with higher quality and more responsive products and services were it to become a government corporation.

We understand the provisions of HR 1659 to result in the PTO being headed by a Chief Executive Officer, who would be appointed by the President and confirmed by the Senate, and advised by an 18-member Management Advisory Board. In the view of IIPA, HR 1659 is the ideal legislation by which to convert the PTO into a free-standing government corporation.

We also understand there to be some who have encouraged your Subcommittee to expand HR 1659 to include the Copyright Office. While such a broader based proposal may be ultimately desirable, the IIPA has no position on that expansion at this time. However, the present legislative progress of HR 1659 as currently proposed, would likely be delayed were it so amended, such that HR 1659 would not become law during the 104th Congress. For that reason alone, the IIPA would encourage the Subcommittee to act favorably upon HR 1659 as presently drafted, without expanding its provisions to include the Copyright Office.

On behalf of IIPA, we appreciate the opportunity to submit this letter in support of HR 1659.

Kindest personal regards,



Thomas F. Smega, Jr.  
President

TFS:inka

cc: Senator Hatch  
Senator Feinstein





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